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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1847

BANGOR AND AROOSTOOK RAILROAD CO. and CANADIAN PACIFIC LIMITED,
PETITIONERS,

v.

INTERSTATE COMMERCE COMMISSION, ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	4
Statement of the Case	5
1. Proceedings Below	5
2. Facts Material to Consideration of the Questions Presented	7
3. Treatment Below of the Asserted Statutory Violation	11
Reasons For Allowance of the Writ	13
I. The Decision Below Raises Important Questions Concerning the Constitutional Protection To Be Accorded Commercial Speech in Heavily Regulated Industries.	15
II. This Case Raises Important Questions Concerning the Interpretation of The Interstate Commerce Act and the Reach of This Court's Summary Affirmance in *Southern Pacific Co.* v. *United States.*	21
III. The Award Sustained Below Raises Important Questions Concerning Whether, in Matters Concerning Commercial Speech, Damage Remedies Must Be Tailored to the Scope of the Violation Found.	27
IV. The Case Raises Important Questions Concerning Application of the Doctrine of Tolling of a Federal Statute of Limitations By Reason of "Fraudulent Concealment."	31
Conclusion	35
Appendix A	
Principal Opinion of the Court of Appeals for the First Circuit (March 30, 1978)	A-1

Page

Decree of the Court of Appeals for the First Circuit (March 30, 1978) A-38
Memorandum and Order of the Court of Appeals for the First Circuit on Petition for Rehearing (May 12, 1978) A-40
Order of the Interstate Commerce Commission Reopening Proceedings (May 25, 1978) A-48
Order and Report of the Interstate Commerce Commission (February 4, 1977) A-50

Table of Citations

Cases

A Quaker Action Group v. *Morton*, 516 F.2d 717 (D.C. Cir. 1975) 26
Ashwander v. *T.V.A.*, 297 U.S. 288 (1936) 25
Bates v. *State Bar*, 433 U.S. 350 (1977) 14, 17, 19, 31
Beneficial Corp. v. *F.T.C.*, 542 F.2d 611 (3rd Cir. 1976), *cert. denied*, 430 U.S. 983 (1977) 30
Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) 30
Califano v. *Sanders*, 430 U.S. 99 (1977) 17
Carey v. *Piphus*, 46 U.S.L.W. 4224 (March 21, 1978) 29
Cook v. *Avien, Inc.*, Civil Nos. 77-1106, 77-1107 (1st Cir., filed March 28, 1978) 33, 34
Crowell v. *Benson*, 285 U.S. 22 (1932) 25
Curtis Publishing Co. v. *Butts*, 388 U.S. 130 (1967) 16
Edelman v. *Jordan*, 415 U.S. 651 (1974) 24
Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976) 25
F.T.C. v. *Simeon Management Corp.*, 532 F.2d 708 (9th Cir. 1976) 25
Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) 31
Hicks v. *Miranda*, 422 U.S. 332 (1975) 24

Page

Hormel v. *Helvering*, 312 U.S. 552 (1941) 17
I.C.C. v. *Oregon-Washington RR. & Nav. Co.*, 288 U.S. 14 (1933) 25
I.C.C. v. *United States*, 289 U.S. 385 (1933) 29
In re Primus, 46 U.S.L.W. 4519 (May 30, 1978) 19
Japanese War Notes Claim. Ass'n of Phil., Inc. v. *United States*, 373 F.2d 356 (Ct. Cl.), *cert. denied*, 389 U.S. 971 (1967), *reh. denied*, 390 U.S. 975 (1968) 33
Keogh v. *Chicago & N.W. RR. Co.*, 260 U.S. 156 (1922) 29
Klein v. *Bower*, 421 F.2d 338 (2d Cir. 1970) 33
Linmark Associates, Inc. v. *Willingboro*, 431 U.S. 85 (1977) 17
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 17
Moviecolor Limited v. *Eastman Kodak Co.*, 288 F.2d 80 (2d Cir. 1961) 33
Nat'l Comm. on Egg Nutrition v. *F.T.C.*, 570 F.2d 157 (7th Cir. 1977), *pet'n for cert. filed*, 46 U.S.L.W. 3694 (April 25, 1978) 30
N.L.R.B. v. *Gissel Packing Co.*, 395 U.S. 575 (1969) 17, 27
N.L.R.B. v. *Fruit & Vegetable Packers*, 377 U.S. 58 (1964) 25
Ohralik v. *Ohio State Bar Ass'n*, 46 U.S.L.W. 4511 (May 30, 1978) 15, 17, 19, 20, 26, 31
Parsons v. *Chicago & N.W. RR. Co.*, 167 U.S. 447 (1897) 29
Pennsylvania RR. Co. v. *Int'l Coal Min. Co.*, 230 U.S. 184 (1913) 29
Plano v. *Baker*, 504 F.2d 595 (2d Cir. 1974) 26
Prather v. *Neva Paperbacks, Inc.*, 446 F.2d 338 (5th Cir. 1971) 33
Providence & Worcester Co. v. *Robert W. Meserve and Benjamin H. Lacy, Trustees, et al.*, No. 36438 (I.C.C. Sept. 3, 1976) 14
S.E.C. v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969) 30

	Page
Southern Pacific Co. v. *United States*, 277 F. Supp. 671 (D. Neb. 1967) (three-judge court), *aff'd per curiam*, 390 U.S. 744 (1968)	11, 22, 23, 24, 30
Tully v. *Griffin, Inc.*, 429 U.S. 68 (1976)	24
United States v. *General Motors Corp.*, 323 U.S. 373 (1945)	6
United States v. *Rumely*, 345 U.S. 41 (1953)	25
Valentine v. *Chrestensen*, 316 U.S. 52 (1942)	24
Virginia State Board of Pharmacy v. *Virginia Citizen's Consumer Council, Inc.*, 425 U.S. 478 (1976)	16, 17, 26, 31
Warner-Lambert Co. v. *F.T.C.*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 46 U.S.L.W. 3616 (1978)	26, 30
Watts v. *United States*, 394 U.S. 705 (1969)	25
Western Pac. R. Co. v. *United States*, 382 U.S. 237 (1965)	15
Westinghouse Electric Corp. v. *City of Burlington*, 351 F.2d 762 (D.C. Cir. 1965)	33

Constitutional Provisions

United States Constitution, First Amendment	*passim*

Statutes

28 U.S.C. §1254(1)	2
§2350(a)	2
Interstate Commerce Act:	
49 U.S.C. §3(4)	*passim*
§9	34
§10(4)	24
§15(10)	23
§15(11)	23

	Page
§15(12)	24
§16(2)	6, 7, 35
§16(3)(b)	4, 11, 32, 34

Miscellaneous

H. Rep. No. 456, 66th Cong., 1st Sess. (1919)	23
H. Rep. No. 650, 66th Cong., 2d. Sess. (1920)	23
59 Cong. Rec. 143 (1919)	23
58 Cong. Rec. 8317 (1919)	23

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners Bangor and Aroostook Railroad Co. and Canadian Pacific Limited respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on March 30, 1978, and to review the denial with opinion of a petition for rehearing entered in this proceeding on May 12, 1978. Respondents in this Court are the Interstate Commerce Commission, the United States of America, Maine Central Railroad Co., and Robert

W. Meserve and Benjamin H. Lacy, Trustees of the Property of Boston and Maine Corporation, Debtor.

Opinions Below

The principal opinion of the Court of Appeals appears in the Appendix at pages A-1 *et seq.*; the opinion of the Court of Appeals on petition for rehearing appears in the Appendix at pages A-40 *et seq.*; the opinion of the Interstate Commerce Commission appears in the Appendix at pages A-50 *et seq.* None of these opinions has as yet been reported.

Jurisdiction

The decree of the Court of Appeals for the First Circuit was entered on March 30, 1978. A timely petition for rehearing or, in the alternative, for rehearing *en banc*, was filed on April 13, 1978, and was denied by orders entered May 12, 1978.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1) and 28 U.S.C. §2350(a).

Questions Presented

The Court of Appeals held that section 3(4) of the Interstate Commerce Act, 49 U.S.C. §3(4), prohibits a railroad from systematically soliciting shippers on its line to use through routes passing over only one of the railroad's two connecting lines, unless such preferential solicitation can be objectively justified in terms of a policy grounded in the Act or approved by the Interstate Commerce Commission. The court found the Bangor and Aroostook Railroad and one of its connecting lines, CP Rail, to have violated this prohibition, and sustained the Commission's award of

substantial damages for lost traffic to the railroads forming the Bangor and Aroostook's other connecting line. The court remanded the Commission's cease-and-desist orders for further delineation of what solicitation the Commission still considered lawful.

Responding to the claim that such extensive control of commercial solicitation contravened recent decisions of this Court concerning constitutional protection of commercial speech, the Court of Appeals held that regulating speech in "areas of extensive economic supervision" was more a matter of policy development for Congress and the regulatory agencies than a matter of "constitutional right".

Finally, the court deferred to the Commission's determination that the applicable statute of limitations had been tolled so as to permit the complaining railroads to recover damages for the entire period of violation.

The questions presented by this petition are as follows:

(1) Whether commercial solicitation in federally regulated industries, and specifically in the railroad industry, is entitled to the protection of the free-speech guarantee of the First Amendment to the United States Constitution.

(2) Whether the relationship between a railroad and the commercial shippers situated on its line is so fraught with danger of undue influence as constitutionally to justify restrictions, other than prohibitions on false or deceptive speech, on the content of the railroad's solicitations of those shippers.

(3) Whether 49 U.S.C. §3(4), which forbids railroads to "unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper", should be construed to forbid a railroad to solicit commercial shippers to use through routes over one of the railroad's connecting lines.

(4) Whether in assessing damages for a violation of 49 U.S.C. §3(4) the Commission may award damages for

that portion of the affected traffic which would have been lost by the complainant even had no statutory violation occurred.

(5) Whether the standards for tolling 49 U.S.C. §16(3) in a case of alleged fraudulent concealment of the cause of action are different from such standards with respect to every other federal statute.

Statutory Provisions Involved

The two provisions of the Interstate Commerce Act, as amended, which are principally involved in this proceeding, are as follows:

United States Code, Title 49, Section 3(4):

All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title.

United States Code, Title 49, Section 16(3)(b):

All complaints against carriers subject to this chapter for the recovery of damages not based on overcharges shall be filed with the commission within two years from the time

the cause of action accrues, and not after, subject to subdivision (d) of this paragraph.

Statement of the Case

1. *Proceedings Below.*

This case began on December 5, 1973, when the Interstate Commerce Commission, pursuant to 49 U.S.C. §§12, 13(1), 13(2), instituted an investigation into the lawfulness of certain interchange arrangements between the present petitioners, Bangor and Aroostook Railroad Company (BAR) and CP Rail, Canadian Pacific Limited (CP). On March 13, 1974, the Maine Central Railroad Company (MEC) made complaint to the Commission pursuant to 49 U.S.C. §§9, 13(1), claiming damages from BAR on the ground that the arrangements under investigation violated section 3(4) of the Interstate Commerce Act, 49 U.S.C. §3(4). On July 8, 1974, Robert W. Meserve and Benjamin H. Lacy, Trustees of the Property of Boston and Maine Corporation, Debtor (B&M) filed a similar complaint.

These three proceedings were consolidated, and tried before an Administrative Law Judge. Following the filing of exceptions, the Commission, by report and order dated February 4, 1977, found that BAR, aided by CP, had violated section 3(4) of the Act. The Commission ordered BAR to cease and desist from violating section 3(4); prohibited CP from aiding BAR in any such violation; and directed BAR to pay damages of $176,323 to MEC and $86,917 to B&M, plus interest.

On February 11, 1977, BAR filed with the Court of Appeals for the First Circuit its petition for review of the Commission's action; CP subsequently intervened as a petitioner in that proceeding. MEC and B&M also timely

filed their own petitions for review, seeking to enlarge the damage award. Jurisdiction in the Court of Appeals of all these petitions was predicated on 28 U.S.C. §§2321, 2342, 2344. Pursuant to 28 U.S.C. §§2322, 2344, the United States and the Commission were respondents in all three actions, and the railroads intervened as respondents in each others' actions as appropriate.

By opinion and decree dated March 30, 1978, the Court of Appeals disposed of the consolidated case by sustaining the Commission's findings of liability and its damage award, and by vacating and remanding for clarification the Commission's cease and desist orders. BAR's timely petition for rehearing and/or rehearing *en banc* was denied by orders and opinion entered May 12, 1978. The present petition seeks review of these decisions and orders.[1]

[1] By order dated May 25, 1978, the Commission reopened proceedings "for the limited purpose of clarifying the scope of conduct prohibited under section 3(4) of the Interstate Commerce Act contemplated by the cease-and-desist orders . . . ." (App. A-48.) Also pending, in the District Court of Maine, Northern Division, are complaints filed by MEC and B&M seeking to compel the payment of damages from BAR pursuant to 49 U.S.C. §16(2). *Maine Central RR. Co.* v. *Bangor & Aroostook RR. Co., Civil* 78-21 ND; *Robert W. Meserve and Benjamin H. Lacy, Trustees* v. *Bangor & Aroostook RR. Co.,* Civil 78-22 ND. BAR has moved the Commission and will move the District Court to stay these proceedings pending the outcome of the present petition. Despite the Commission's reopening of the proceedings, petitioners believe that the allowable scope of the cease-and-desist orders are properly before this Court at this time. All further proceedings will turn on "the scope of conduct prohibited under section 3(4)" in light of the First Amendment — precisely the issues this Court would address in reviewing the damage award as well. Thus, this Court should review the entire case since the issues presented are "fundamental to further conduct of the case." *United States* v. *General Motors Corp.,* 323 U.S. 373, 377 (1945).

2. *Facts Material To Consideration Of The Questions Presented.*[2]

The Bangor and Aroostook Railroad stretches across northeastern Maine. It is an originating, rather than a connecting, carrier; most of its traffic is either shipped from, or consigned to, termini on its line.

Almost all of the traffic which BAR interchanges with other railroads passes through either Brownville Junction or Northern Maine Junction, which are 45.3 miles apart. At Brownville Junction, BAR interconnects with CP; at Northern Maine Junction, BAR joins with MEC, which in turn links up with B&M. These two junctions provide alternative routes to many points of origination or destination. Thus, many of the shipments beginning or ending on BAR's tracks can be routed either over CP or over MEC and B&M.

Railroad traffic in Maine consists primarily of raw materials for, and the final products of, Maine's paper and potato industries. In 1969, the great bulk of this traffic passed through Northern Maine Junction. During the period 1970 to 1974, a somewhat lesser proportion was shipped via Northern Maine Junction, although in most commodities considerably better than half the traffic continued to move via that gateway.

The switch of traffic volume from MEC/B&M to CP routes was held by the Commission and the court below

[2] This statement is drawn from the facts as stated by the Court of Appeals and as found by the Commission. Some of these facts were contested by petitioners below as being erroneous and not supported by substantial evidence, but the Court of Appeals ruled otherwise (App. A-17—A-18.) Petitioners do not renew these objections here, save as an independent review by this Court of certain evidence bearing on First Amendment rights may be warranted, see p. 19, *infra*. However, in accepting the facts stated below for present purposes, petitioners do not waive their right to contest factual matters in the proceedings pending in the District Court of Maine, where the findings of the Commission are, by statute, only "prima facie evidence", 49 U.S.C. §16(2).

to have been the result of a successful solicitation campaign conducted by BAR and CP, in which shippers were requested to route their traffic through Brownville Junction, via CP, rather than through Northern Maine Junction, via MEC. There is no contention in this case that the route of any of the traffic at issue was not specified by its shipper, or that any carrier failed to follow any shipper's orders.

The solicitation program of BAR and CP was embodied in a formal agreement entered into in July, 1970. In that agreement (App. A-112 - A-115), BAR undertook to "interline" with CP "as many cars of paper products and potatoes as . . . possible. . . ." CP, in turn, agreed to pay BAR a "car allowance" for every additional car passing through Brownville Junction (where BAR had previously received a smaller division of revenues with respect to some paper and potato traffic than had been received with respect to such traffic going through Northern Maine Junction); CP also undertook to make major improvements in its interchange facilities. As stated by the court below (App. A-6 - A-7), "[n]ot specifically spelled out in the memorandum [of agreement], but apparent from the correspondence and testimony regarding the negotiations of early 1970, was the commitment of both parties vigorously to solicit traffic on behalf of CP." Agreements preferentially to solicit on behalf of some through routes rather than others are, to a certain extent, common in the railroad industry.

This particular agreement was negotiated in late 1969 and early 1970, following the assumption of control of BAR by the Amoskeag Co.[3] Under new ownership, BAR had conducted studies as to what traffic could go via CP, rather than via MEC, without a change in destination; and as

[3] Amoskeag also owned 26 percent of MEC's stock, and there was some fear among at least certain shippers as to what their position would be, were BAR and MEC to merge. The Commission explicitly refused to decide whether this possible merger played any part in motivating the BAR-CP arrangement or solicitations. (App. A-78.)

to the comparative transit times for goods traveling the alternate routes. Although MEC enjoyed a predominant share of the market, this latter study, in the words of the court below (App. A-5), "showed little over-all difference between the two routes."

Pursuant to their arrangement, BAR and CP solicited shippers to increase their shipments over CP routes. This solicitation was carried out by BAR's marketing officials and sales agents, and by CP's sales force. They made personal visits to shippers, and wrote letters, and at times BAR and CP personnel jointly visited shippers. BAR also distributed guides to shippers informing them of suggested routes to various destinations that could be used for traffic sent via Brownville Junction.

A large part of the solicitation of shippers was made by CP's sales force acting alone. CP also solicited some large corporate consignees of paper products, in an effort to have them request the paper companies to use CP routes. The court below held that BAR was responsible for CP's solicitation efforts because of the support BAR gave to CP. (App. A-26.)

The Commission, aside from brief discussion of a few minor incidents involving a trivial amount of traffic, made no finding that the solicitations of BAR or CP were fraudulent or coercive of shippers. The Commission also made no finding that the factors cited to shippers to persuade them to route via CP—which included shorter transit times, greater reliability, improved availability of cars for loading, and the need to stimulate improvement of the alternate route through Brownville Junction—were generally false or misleading. The Court of Appeals did not independently make any such findings, either.[4]

[4] The court at one point (App. A-17) off-handedly stated that "the Commission's opinion leaves little doubt that BAR's statements were at least misleading"; but at another point, (App. A-7, n.7) the court agreed that the Commission never decided that the service factors cited to shippers were generally misleading or invalid.

Instead, the court rested its analysis on a different set of asserted facts. First, the court emphasized that BAR's solicitations were systematically in favor of CP. Second, the court thought, as the Commission had also suggested, that CP's and BAR's recommendations, whether or not in fact based on true information, were not grounded in a sufficient effort to determine the accuracy of the matters asserted. Third, the court asserted, although in this case the Commission had never explicitly so found, that an originating carrier such as BAR "could reasonably be found" to have "substantial influence over shippers' choice of routes. . . ." (App. A-16.)

Little emphasized in the opinions below, yet nonetheless apparent, is the fact that almost all, if not all, of BAR's and CP's solicitation efforts were directed at major corporate shippers or consignees. Indeed, the great preponderance of the traffic at issue (and the great bulk of all BAR's traffic) was shipped by, or consigned to, the two paper companies located on BAR's lines, the Great Northern Paper Company and Fraser Companies Limited. (App. A-126.) These large shipper who were solicited were companies with extensive shipping experience who were continually in the shipping market. And, as is apparent from the predominating position MEC held prior to the solicitation campaign of BAR and CP, and indeed even during it, the major shippers involved had and continued to have extensive experience with the merits and demerits of MEC's alternate route.

Precisely because of the small number of major shippers involved, and MEC's continuing relationship with them, MEC was able to begin a solicitation campaign of its own shortly after BAR and CP initiated their campaign. MEC's efforts included direct meetings between MEC's president and top executives of the two paper company shippers, as well as a more general effort on the part of MEC's entire

sales force. MEC, in the words of the court below (App. A-7), "evidently had some success" in countering BAR's and CP's efforts.

This counter-solicitation effort, and other evidence, make it clear that MEC knew in 1970 that BAR and CP had undertaken a joint solicitation campaign on behalf of Brownville Junction routes, and that shippers were responding to that campaign. Yet MEC and B&M did not file their complaints with the Commission until 1974, after the Commission independently had launched its own investigation. Although the applicable statute, 49 U.S.C. §16(3)(b), prescribes a two-year limitation period, the Court of Appeals affirmed the Commission's holding that BAR's failure to provide to MEC, on request by it, a copy of the written agreement between BAR and CP operated to toll the statute and allow recovery from 1970 onwards.

3. *Treatment Below Of The Asserted Statutory Violation.*

Both the Commission and the Court of Appeals held that by reason of some combination or another of the foregoing facts BAR, aided by CP, had violated section 3(4) of the Interstate Commerce Act, 49 U.S.C. §3(4). That statute provides, in pertinent part:

> All carriers subject to the provisions of this chapter . . . shall not . . . unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper.

While it is clear that the Commission, relying on *Southern Pacific Co.* v. *United States*, 277 F.Supp. 671 (D. Neb. 1967) (three-judge court), *aff'd per curiam*, 390

U.S. 744 (1968), thought that this language could cover certain solicitation practices, it is by no means clear which practices they were. The Commission's opinion at times seems to say that originating carriers can solicit for connecting lines only after a thorough consideration of which route would best serve the shipper (App. A-75), but at other times it indicates that carriers can solict for their own commercial advantage (App. A-76). Similarly, while at times the opinion embraces the notion that each railroad should only solicit for its own portion of a route (App. A-76), the opinion makes clear that the Commission did not intend broadly to overturn the industry practice of preferentially soliciting for entire through routes, by agreement (App. A-76). As the Court of Appeals put the matter, "the Commission's opinion contains some puzzling aspects" (App. A-11, n. 9), has "mystifying parts", (App. A-36, n.20), and leaves "a vast unillumined area concerning preferential solicitation and related activity and the application of the statute" (App. A-36).

Despite these ambiguities, which made it impossible to know the substance of what would be permissible practice in the industry, the Court of Appeals found itself able to uphold the Commission's finding of liability and assessment of damages because what BAR and CP had done constituted, in the court's view, a "hard core" violation of the statute. (App. A-35.) The holding, which defined that "hard core" violation, was framed as follows (App. A-12):

> [W]e go no further than to support a ruling that active and deliberate solicitation by an originating carrier for one or more of its connecting lines, to the plain neglect and detriment of other connecting lines, violates §3(4) of the Act, when such solicitation is not supported by a significant service differential between those carriers (or any other specific exception grounded in the Act) that objectively could justify a departure from impartial treatment. [Footnote omitted.]

The Commission's cease-and-desist orders, far from being tailored to this particular violation, were of the "stop disobeying the statute" variety. Accordingly, the Court of Appeals vacated and remanded the orders for clarification. Among the points the Court asked the Commission to address were the degree to which it was prepared to endorse any "preferential solicitation agreements"; whether an originating carrier could solicit for its own best revenue route; and what an originating carrier could safely do when asked by a shipper for a routing recommendation. (App. A-36.)

Finally, the Court of Appeals held that its construction of the statute did not violate the First Amendment. Since it gave no cautionary instructions to the Commission on remand, the Court must also have been of the view that the First Amendment would not be infringed by any of the possible answers the Commission might give to the questions it had posed. The reasoning behind this broad grant of discretion to the administrative agency was that the First Amendment does not limit regulation of commercial speech in "areas of extensive economic supervision". (App. A-17.)

Reasons for Allowance of the Writ

Whether BAR's and CP's solicitation campaign was violative of Section 3(4) of the Interstate Commerce Act poses what the Commission described as a "novel issue" of "first impression" (App. A-68, A-94), which takes on national significance inasmuch as "preferential solicitation agreements are to a certain extent commonplace in the railroad industry" (App. A-76). Never before has the

Commission or any court found a solicitation arrangement *simpliciter*[5] to violate section 3(4), and never before has the Commission awarded damages for any violation of section 3(4). (App. A-94.) The outcome of this case may thus be expected to have a broad impact on the commercial solicitation practices of the nation's financially troubled railroad industry.[6]

The decision below further poses questions of great importance as to the permissible limits under the First Amendment to the Constitution of restraints on commercial speech. The Court below held that in heavily regulated industries commercial speech may also be regulated as Congress and the agencies see fit without the necessity to consider First Amendment values. That conclusion implicates the scope of permissible agency power and the concomitant role of courts in assessing challenges to agency regulation across a broad spectrum of federal regulatory law.

Furthermore, the decision poses fundamental questions raised, but left unresolved, by this Court's recent "commercial speech" decisions. In particular, the case raises the difficult questions noted in *Bates* v. *State Bar*, 433 U.S. 350, 383-84 (1977), of delineating between "misleading" and protected commercial speech, and questions concern-

[5] See pages 21-23, *infra*.

[6] The Commission noted that it was "acutely aware" that preferential solicitation arrangements were in force and sought to reassure the industry that not all were illegal. (App. A-76.) However, it failed utterly to give content to that assurance, thus necessitating the remand. It is pertinent to note that other arrangements are being challeged on the theory of this case; following the Administrative Law Judge's decision in this case a proceeding before the Commission was instituted challenging an alleged solicitation arrangement entered into by Penn Central, ConRail and one of the complainants herein. *Providence & Worcester Co.* v. *Robert W. Meserve and Benjamin H. Lacy, Trustees, et al.*, No. 36438 (I.C.C., Sept. 3, 1976).

ing the reach of this Court's recent decision holding that in some contexts solicitation poses sufficient dangers to the public interest to justify a prophylactic rule barring the practice entirely. *Ohralik* v. *Ohio State Bar Ass'n*, 46 U.S.L.W. 4511, 4516 (May 30, 1978).

Finally, the decision below raises a novel and important question concerning the level of knowledge by a plaintiff required to trigger the running of a federal statute of limitations where it has been found that the defendant at some point concealed facts relevant to the cause of action. On this general issue the decision below is at odds with decisions of many other federal courts, and, indeed, appears to be unprecedented.

I. The Decision Below Raises Important Questions Concerning The Constitutional Protection To Be Accorded Commercial Speech In Heavily Regulated Industries.

The "manifest purpose" of section 3(4) of the Interstate Commerce Act is "to deprive railroads of discretion to apportion economic advantage among competitors at a common interchange." *Western Pac. R. Co.* v. *United States*, 382 U.S. 237, 244 (1965). The court below and the Interstate Commerce Commission read section 3(4) also to require impartiality, as between connecting carriers, in the solicitation of shippers by an originating carrier. (App. A-12, A-76). Thus the court held that an originating carrier violates section 3(4) if it preferentially solicits for one connecting line when objectively based service differentials do not support the preference. (App. A-12.)

This view narrowly restricts the content of the information which an originating carrier may provide to shippers.

It takes little account of the fact that an originating carrier, which competes with non-rail alternatives, realistically must sell a "through route" — that is, must convince shippers to use a rail route, not merely over its own lines, but from the point of origin to the point of destination. Certainly many factors which might rationally be considered by shippers in preferring one through route over another — such as a desire to promote an alternative gateway, to prop up a failing connecting carrier, or even to penalize a connecting carrier who has urged a rate hike — could not be defended as objectively based on service differentials. Thus originating carriers would not be permitted to convey such information to shippers if the court's view is applied literally.

The court's narrow view of the reasons for route preference which originating carriers may cite to shippers is at odds with this Court's commercial speech cases, which collectively establish a constitutional presumption in favor of the free exchange of truthful commercial information. The Court of Appeals largely dismissed BAR's reliance on these cases[7] with the observation that:

[7] The Court of Appeals also noted that First Amendment arguments were not raised before the Commission. (App. A-16.) However, the Court proceeded to decide the merits. This Court should not hesitate to review a decision on the merits of constitutional issues even if another, procedural ground for the result could arguably have been relied on.

Certainly the present situation falls far short of the "clear and compelling" circumstances necessary to find a waiver of First Amendment rights. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 143-45 (1967). This proceeding was initiated on December 5, 1973, long before any of the "commercial speech" cases were decided. Briefs to the Administrative Law Judge were filed on March 5, 1976, before the decision in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 478 (1976). Although it was theoretically possible for BAR to have referred to that case in its exceptions filed with the Commission on August 23, 1976, realistically the import of this Court's new departure did not become apparent until the opinions were filed in the decisions handed down, not only after the Commission's order had been filed, but after BAR had instituted its action for judicial review in February, 1977. *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, was decided May 2, 1977, and *Bates* v. *State Bar*, 433 U.S. 350, was decided June 27, 1977. It has long been the law that parties, on review, may rely on intervening decisions of this Court. *Hormel* v. *Helvering*, 312 U.S. 552 (1941). This principle should be especially applicable when no prejudice results because, in any case, the constitutional question presented would require independent judicial judgment regardless of the Commission's conclusions. *See, e.g., Ohralik* v. *Ohio State Bar Ass'n*, 46 U.S.L.W. 4511, 4516 (May 30, 1978); *Califano* v. *Sanders*, 430 U.S. 99, 109 (1977); *Mathews* v. *Eldridge*, 424 U.S. 319, 329-31 and n.10 (1976).

Though first amendment protection has lately been afforded some types of commercial speech, *see Bates* v. *State Bar*, 433 U.S. 350 (1977) (attorney advertising); *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85 (1977) (residential "for sale" signs); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (advertising of drug prices), the first amendment has not been held to limit regulation in areas of extensive economic supervision such as the securities, antitrust, and transportation fields, where the exchange of information can be a vital element in an illegal scheme. Shaping the regulation of "speech" in those areas is more a matter of policy development than one of constitutional right; it lies most appropriately with Congress and the regulatory agency. (App. A-16 - A-17.)

Yet that analysis surely accords too little weight to the constitutional values of speech even in an area of "extensive economic supervision". *See N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575, 616-19 (1969).

There is nothing *a priori* about the commercial market in which rail carriers operate which would justify a special exception from the constitutionally based presumption

favoring the free exchange of commercial information, or from its corollary that the remedy for partisan commercial speech is more speech. To narrowly restrict the information that shippers may receive from originating carriers in order to preserve "even-handedness" among connecting lines is to subordinate to the regulatory policy of section 3(4)—a statute which, by its terms at least, does not restrict solicitation at all—the constitutional right of shippers to hear commercial information and to decide for themselves whether it is relevant to their needs. Clearly, the Court's view that BAR's solicitation campaign wholly lacked constitutional protection cannot be sustained solely because the economic environment in which railroads operate is heavily regulated.

The Court of Appeals went on to say that "despite the absence of an express ruling that BAR's solicitations included statements that were fraudulent or deceptively made, the Commission's opinion leaves little doubt that they were at least misleading." (App. A-17.) However, the court certainly did not mean that the statements were "misleading" in the sense of "untrue", because it elsewhere (App. A-7, n.7) noted that the Commission had never made that finding. Rather, considering the opinion below in its entirety, the court's criticism was that the solicitations were "misleading" only in the sense that they were not consistently based on prior research into the specific service advantages of one route over another. Thus the court stated that "the Commission's criticism fairly lay in the absence of conscientious comparison [between alternate routes] as foundation for these substantive recommendations" (App. A-7, n.7), and further asserted that section 3(4) "does not dictate silence" but rather "[i]t does require that an originating carrier make good faith efforts to ascertain the accuracy of purported 'information' . . . ." (App. A-17.)

The conclusion that a failure conscientiously to verify the content of a solicitation which is in fact truthful renders the solicitation "misleading" *per se*, is at best a curious use of that term. While it is not inconceivable that liability could be predicated on nothing more than an indifference to truth and that a rule to that effect might pass muster as a "regulation to assure truthfulness . . .", *Bates, supra*, 433 U.S. at 383, if the court below really intended that result it should have made a careful assessment of the dangers which would justify such a stringent standard. Manifestly there was no such inquiry; and the court undertook no independent review of the constitutionally pertinent facts of record as would be required by this Court's First Amendment decisions. *See e.g., Ohralik* v. *Ohio State Bar Ass'n*, 46 U.S.L.W. 4511, 4516 (May 30, 1978); *In re Primus*, 46 U.S.L.W. 4519, 4525 (May 30, 1978). Thus, if the court's offhand characterization of the speech as "misleading" is to be credited at all, it raises one of the important "problems in defining the boundary between deceptive and nondeceptive advertising [which] remain to be resolved . . ." *Bates, supra*, 433 U.S. at 384.

It seems more likely that the court's seeming indifference to the actual content of the solicitations at issue stemmed from its observation that "regardless of a shipper's experience or sophistication", an originating carrier "could reasonably be found to command a position from which it exerts substantial influence over shippers' choice of routes". (App. A-16.) The court, suggesting an analogy to the situation of attorney advertising, apparently feared that an originating carrier might use that influence to the shipper's detriment. (App. A-17.) That reasoning by the court bears a superficial resemblance to the analysis later used by this Court in *Ohralik, supra*. There it was determined that when solicitation occurs in an atmosphere

"inherently conducive to overreaching and other forms of misconduct", government may adopt prophylactic rules imposing penalties for solicitation without regard to whether any particular communication is in fact injurious. *Ohralik, supra,* 46 U.S.L.W. at 4516.

However, the situation here was far different from that depicted in *Ohralik.* Almost all of the traffic at issue was shipped by the two large paper companies (App. A-126), which directly knew the merits of the alternative MEC-B&M routes because they had extensively used them, and which were subject to solicitations by all of the competing carriers (App. A-62). Further, because a continuing commercial relationship existed, shippers were capable over time of evaluating and verifying for themselves the representations made by all carriers. Particularly with respect to large corporate shippers, it is inherently implausible to believe they were or could have been victims of the sort of overreaching this Court condemned in *Ohralik.* The court below marshalled no substantial record evidence to the contrary, nor does its conclusion draw any support from the terms of section 3(4), which make no distinction between originating carriers and other carriers.[8]

Finally, the court below was clearly not of the view that originating carriers enjoy such market power that direct solicitation by them must be completely forbidden. It left the Commission free to permit preferential solicitation by originating carriers based on non-service factors such as a desire to improve their revenues or to meet non-rail competition. (App. A-36.) Thus, whatever special influence an

[8] Moreover, BAR was held to account not only for its own solicitations, or solicitations jointly made with CP, but for solicitations undertaken by the connecting carrier, CP, alone — and, indeed, even for CP solicitations addressed to consignees about the country rather than to Maine shippers (App. A-67). At minimum with respect to these CP solicitations, and particularly with respect to CP's solicitations of consignees, BAR's status as an originating carrier would be immaterial.

originating carrier may have which would justify restrictions on its freedom to solicit, that influence, even in the court's view, falls far short of the sort of inherently suspect influence this Court found present in *Ohralik.*

As the court below recognized (App. A-16), commercial solicitations—that is, sales efforts directed to commercial users of goods and services—often occur in a context of mutual dependence where each party has some influence over the other. Whether, for First Amendment purposes, such solicitation practices directed to commercial and industrial users ought to be distinguished from consumer solicitations is a question of far reaching importance not previously addressed by this Court. This case presents an opportunity for this Court to clarify those circumstances in which regulatory bodies may depart from the presumption of a self-correcting market in commercial speech towards prophylactic rules based on the dangers that the listener may be misled or his judgment skewed by the solicitor's undue influence. Regulatory bodies and lower courts are in need of further guidance with respect to the standards that should be applied as they weigh the governmental interest in suppressing commercial speech which has a potential for deception against the constitutional values in a free exchange of commercial information. As these issues are of great importance, not only to the present parties, but to all commercial speakers who might be thought to exert special influence over their audiences, they are worthy of consideration by this Court.

II. This Case Raises Important Questions Concerning the Interpretation of the Interstate Commerce Act and the Reach of This Court's Summary Affirmance in *Southern Pacific Co.* v. *United States.*

The Court of Appeals found BAR's and CP's conduct to constitute a "hard core" violation of section 3(4) of the

Interstate Commerce Act, 49 U.S.C. § 3(4) (App. A-13 n.10, A-35). This statement is remarkable, because the court premised its holding on the solicitation practices used by these carriers, even though section 3(4) does not, at least in terms, address solicitation of shippers at all. What is forbidden is to "unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper."

To extend this statute from the distribution of unrouted traffic to solicitation on behalf of specific routes, the court below, as the Commission before it, relied on the decision in *Southern Pacific Co.* v. *United States*, 277 F.Supp. 671 (D. Neb. 1967) (three-judge court), *aff'd per curiam*, 390 U.S. 744 (1968). That case was interpreted by the Court of Appeals as holding that a solicitation campaign conducted by a carrier systematically in favor of one of its connecting lines rather than another, violates section 3(4). (App. A-8—A-9.)

For reasons briefly noted in the margin, the *Southern Pacific* case is distinguishable from the instant case.[9] The railroad industry as a whole apparently treated the *Southern Pacific* decision as standing for something different from the reading given it by the court below, since "preferential solicitation agreements" remained "commonplace"

[9] The most notable differences are: (1) the *Southern Pacific* case involved preferential solicitation only as part of a policy of preferential routing of unrouted traffic, which is the conduct section 3(4) forbids, and which is not involved in the present case; (2) damages were not at issue in *Southern Pacific*, so no question of whether particular solicitations were true or false had to be decided; and (3) the *Southern Pacific* language relied on by the Commission and the court below was in any case only an alternative holding, and subordinate to the main point of *Southern Pacific*, which was construction of the Pacific Railroad Acts, not here involved. Thus, despite the use of it made below, this Court's affirmance does not provide authoritative guidance with respect to the proper construction of section 3(4).

in the industry. (App. A-76.) Moreover, whatever the three-judge court's holding in the *Southern Pacific* case, the Commission had not in that litigation, nor since until the instant case, construed section 3(4) to reach commercial solicitation. (App. A-68, A-73.)

However, insofar as the *Southern Pacific* case may stand for the proposition stated by the Commission and Court of Appeals, it would appear to have been wrongly decided, particularly in light of the subsequent decisions of this Court which recognize that purely commercial speech is protected by the First Amendment.

Section 3(4) covers the relationships directly between carriers and their connecting lines—as regards interchange facilities, rates, and the distribution of unrouted traffic—and does not speak to the relationships between carriers and shippers. Traffic "not specifically routed by the shipper" means, in the context of the Interstate Commerce Act as a whole, nothing more subtle than traffic as to which the shipper has not exercised his "right to designate in writing by which of such [available] through routes [his] property shall be transported", 49 U.S.C. §15(10). Further, the specific clause of section 3(4) held here to have been violated was added simultaneously with the enactment of 49 U.S.C. §15(11), Transportation Act of 1920, 41 Stat. 479, 487-88. As that section of the Act shows, Congress intended carriers to be liable to each other for diversion of routed traffic only when they disobeyed the instructions given in the bill of lading.[10] Indeed, such respect had Congress for

[10] The specific evils at which §15(11), and derivatively §3(4), were aimed, are clearly set forth in the legislative history of the 1920 Act. See House Report No. 456, 66th Cong., 1st Sess. at 21 (Nov. 10, 1919) (Committee on Interstate and Foreign Commerce); House Report No. 650, 66th Cong., 2d Sess. at 67 (Feb. 18, 1920) (Conference Committee); Speech by Representative Esch, Chairman of the House Committee on Interstate and Foreign Commerce, 58 Cong. Rec. 8317 (Nov. 11, 1919); Speech by Senator Cummins, Chairman of the Senate Committee on Interstate Commerce, 59 Cong. Rec. 143 (Dec. 4, 1919).

the shipper's choice of route that even the Commission, acting in "the public interest" to achieve "a fair distribution of the traffic" was not empowered to override the shipper's instructions. 49 U.S.C. §15(12).

In sum, Congress addressed the situation in which the shipper had designated its preferred route, and determined that the public interest was adequately protected by relying on the shipper's choice, and requiring carriers to obey it. When Congress wanted to reach solicitation — this time of carriers by shippers to discriminate in the shipper's favor — it knew how to say so. See 49 U.S.C. §10(4). There is no indication that section 3(4) of the Act was ever intended to cover more than precisely what its terms indicate — "traffic that is *not* specifically routed by the shipper" (emphasis added).

Although the Court of Appeals may have been warranted in regarding the summary affirmance in *Southern Pacific* as controlling, or nearly controlling, precedent, *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 74 (1976); *Hicks* v. *Miranda*, 422 U.S. 332, 344-45 (1975), this Court is not similarly bound by its prior summary affirmances, *Tully* v. *Griffin, Inc., supra; Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974). Now that it is clear that *Southern Pacific* is being construed by lower courts as having put this Court's imprimatur on an interpretation of section 3(4) which prohibits solicitation pure and simple, this dubious statutory interpretation is worthy of reconsideration here.

Especially is this so since the District Court's decision in *Southern Pacific* was summarily affirmed in 1968, when the First Amendment exception for "commercial advertising" announced in *Valentine* v. *Chrestensen*, 316 U.S. 52, 54-55 (1942), was still thought to be good law. Indeed, no issue was even raised in the *Southern Pacific* litigation, either in the District Court's opinion or in the jurisdictional statement on appeal, concerning whether the

construction of section 3(4) there given comported with the First Amendment. It has long been the rule that, as between fair readings of a statute, the construction that avoids constitutional difficulties will be chosen. *Watts* v. *United States*, 394 U.S. 705, 707 (1969); *United States* v. *Rumely*, 354 U.S. 41, 45 (1953); *Ashwander* v. *T.V.A.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring in part, dissenting in part); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). In light of the recent decisions of this Court, that principle is now applicable to cases concerning the permissible scope of regulation of "commercial speech". *F.T.C.* v. *Simeon Management Corp.*, 532 F.2d 708, 713 (9th Cir. 1976). Even were it not very clear from the design of the Interstate Commerce Act and its legislative history that section 3(4) was never intended to reach solicitation of shippers by carriers, certainly the statutory language fairly bears that construction, and to avoid First Amendment difficulties it should be so read.

This Court has never hesitated to countermand agency action that unnecessarily implicated constitutional values. *N.L.R.B.* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 63 (1964); *I.C.C.* v. *Oregon-Washington RR. & Nav. Co.*, 288 U.S. 14, 40-41 (1933). When an agency for the first time construes language in its governing statute, more than fifty years old, as empowering it to regulate commercial solicitation, its decision should be particularly suspect.

Clearly, an agency cannot regulate solicitation if such regulation manifestly goes beyond the power granted to it by Congress. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 212-14 (1976). But further, agencies ought to be especially cautious about assuming authority to regulate commercial speech without a clear Congressional command to do so, and without clear Congressional guidance as to how

it should be done. Whether such regulation is lawful can be determined only after a careful evaluation of the need for regulation, the degree of constitutional protection a particular form of solicitation deserves, and the degree to which the particular regulation restricts otherwise protected speech. See *Ohralik, supra,* 46 U.S.L.W. at 4514-15; *Virginia State Board of Pharmacy, supra,* 425 U.S. at 762-70; *Warner-Lambert Co.* v. *F.T.C.,* 562 F.2d 749, 770 (D.C. Cir. 1977), *cert. denied,* 46 U.S.L.W. 3616 (1978). This sophisticated balancing of interests which clearly extends beyond an agency's expertise, *see, e.g., A Quaker Action Group* v. *Morton,* 516 F.2d 717, 723 (D.C. Cir. 1975); *Plano* v. *Baker,* 504 F.2d 595, 599 (2d Cir. 1974), should not be unnecessarily undertaken.

In sharp contrast to these well-known cautionary rules of statutory construction, and in apparent disregard of the delicacy and difficulty of the subject matter involved, the Court of Appeals invited the Commission to exercise its own judgment in fashioning cease-and-desists orders, and posed, but gave no guidance as to how the Commission should answer, the following questions (App. A-36):

> May carriers safely join in solicitation arrangements for the purpose of competing with other modes of transportation? What may an originating carrier safely do when asked for a routing recommendation by a shipper? If an originating carrier can demonstrate that one connecting line is significantly better than another in the service it renders, may it advise its shippers to use that line consistently or must it undertake an individual analysis for each shipper? What non-service considerations, if any, will justify a preferential arrangement? [Footnote ommitted.]

The failure of the Court of Appeals to give any guidance whatsoever to the Commission stands in sharp contrast to this Court's decision in *Gissel Packing Co., supra,* 395 U.S. at 616-20, where although Congress had initially defined prohibited and permissible speech, this Court did not hesitate to provide further guidance to the agency.

Thus this case raises the questions both whether section 3(4) was intended to grant the Commission any authority to regulate solicitation of shippers by carriers, and whether, even if the Commission has such authority, it can legitimately exercise that authority in the free-swinging manner suggested by the Court of Appeals.

These questions are important to all rail carriers, and to all shippers by rail. More significantly, they raise a fundamental issue of incalculable importance to the country at large regarding the role of federal regulatory agencies in regulating commercial speech. Accordingly, this Court should grant certiorari to answer these questions, and, more broadly, to give general guidance to the agencies as to how they could proceed in light of the new and emerging commercial speech doctrine, and the fundamental values which underlie it.

III. The Award Sustained Below Raises Important Questions Concerning Whether, In Matters Concerning Commercial Speech, Damage Remedies Must Be Tailored To the Scope of the Violation Found.

The damage award made by the Commission, and sustained by the Court of Appeals, included assessments for all additional traffic which shippers routed via CP during the solicitation campaign of BAR and CP. Even if these solicitations were the sole cause of the changed traffic

patterns, as was found below, many of the solicitations accurately touted superior service over the CP route. For example, by one important measure of service endorsed by the Commission (App. A-76) — transit times — BAR's studies showed that CP routes were superior to the competing MEC routes to 25 percent of the destinations involved, and equal to the competition to another 50 percent (App. A-57). Nonetheless, "[t]he fact that some of the BAR-CP routes may have been superior to the competing MEC-B&M routes" was, the Commission said, "not pertinent" (App. A-78); and the court echoed this view (App. A-17). BAR was held liable because, true or false, the solicitations were found not to have been based on sufficient efforts to ascertain their truth. (App. A-17.)

Whether it is constitutionally permissible to ground liability for commercial speech on a failure adequately to investigate, on the theory that shippers have to be protected from the "special influence" of originating carriers, is a question that has already been raised. See p. 19, *supra*. But even assuming that the danger of undue influence would justify a broad prophylactic regulation, it does not justify a damage award equally broad.

As recognized by the holding below, and certainly true as a constitutional matter, at minimum BAR was entitled to publicize through routes via Brownville Junction that were demonstrably superior, and to try to persuade shippers to use those routes. The mere prior failure to ascertain that superiority, when it in fact existed, did not deprive competing railroads of traffic to which they were fairly entitled; they suffered such injury, if at all, only when shippers acted on inaccurate information. To award MEC and B&M damages for BAR's and CP's failure to investigate in instances in which MEC and B&M deserved

to lose the trade, is to give them a windfall. See *Carey* v. *Piphus*, 46 U.S.L.W. 4224, 4227 (March 21, 1978) (no compensatory damages based on failure to hold pre-suspension hearing, if hearing would have shown student's suspension to be proper).[11]

The Interstate Commerce Act did not require such an award. To the contrary, this Court has long construed the damage award provisions of the Act to require the plaintiff to demonstrate " 'not merely the wrong of the carrier, but that that wrong has in fact operated to [the plaintiff's] injury' " *Pennsylvania RR. Co.* v. *Int'l Coal Min. Co.*, 230 U.S. 184, 200 (1913), *quoting Parsons* v. *Chicago & N.W. RR. Co.*, 167 U.S. 447, 460 (1897); *accord, I.C.C.* v. *United States*, 289 U.S. 385, 390 (1933); *Keogh* v. *Chicago & N.W. RR. Co.*, 260 U.S. 156, 164-65 (1922).

More importantly, awarding such windfall damages offends First Amendment values. It penalizes protected speech, that is, commercial solicitations never shown to be false, deceptive, coercive, or fraudulent. Apparently that was done in furtherance of an unarticulated prophylactic policy. However, even prophylactic policies addressed to preventing purely economic mischief are not normally the basis for awarding damages to those not in fact injured

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[11] BAR also argued in its brief to the Court of Appeals that it was justified in soliciting for the CP gateway, because its net revenues were greater for many shipments on the shorter haul through Brownville Junction. The Court, while not directly addressing this contention, explicitly left to the Commission the general question whether a carrier may solicit for its best revenue route (App. A-13 n.10). If it should be now determined on remand that such solicitations do not offend the policy of section 3(4), this would be a further example of BAR's having been held liable to complainants for damages flowing from a lawful preference of the CP route.

The windfall aspects of the damage award are clear even now as regards traffic which was routed in response to solicitations made by CP alone — traffic for which BAR was held liable in damages (App. A-26), even though CP's solicitations of traffic for its own routes were clearly constitutionally protected.

by the real harm against which the prophylaxis is directed. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

While the permitted scope of damage remedies applicable to commercial speech has apparently not yet been addressed, several Courts of Appeals, in considering the scope of equitable remedies, have found it necessary to be especially sure that the remedy provided is narrowly tailored only to correct or eliminate the specific violation found. *Nat'l Comm. on Egg Nutrition* v. *F.T.C.*, 570 F.2d 157 (7th Cir. 1977), *pet'n for cert. filed*, 46 U.S.L.W. 3694 (April 25, 1978); *Warner-Lambert Co.* v. *F.T.C.*, *supra*; *Beneficial Corp.* v. *F.T.C.*, 542 F.2d 611, 619 (3rd Cir. 1976), *cert. denied*, 430 U.S. 983 (1977). Retrospective damage remedies can be, in many circumstances, more severe than prospective relief. *Cf. S.E.C.* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 866-68 (2d Cir. 1968) (opinion of Friendly, J.), *cert. denied*, 394 U.S. 976 (1969).

In the more than fifty years since the statutory language here at issue was enacted in 1920, the Interstate Commerce Commission had never awarded damages based on its violation — until the present proceeding. (App. A-94.) Now the statute has been extended beyond its plain meaning to encompass solicitation, and, yet further, damages have been awarded even for solicitation in fact true, on the basis that there was not a complete investigation before words were spoken. Certainly, despite the Court of Appeals' view that this Court's summary affirmance in *Southern Pacific Co., supra*, should have alerted BAR to the dangers of its course of action (App. A-10—A-11, A-35), BAR could not reasonably have anticipated that its solicitation campaign would expose it to the broad liability for damages now imposed. Indeed, even now it is unclear what preferential solicitation practices may be safely maintained by railroads. If agencies are allowed retrospectively to

impose this type of burden on commercial speech, then commercial spokesmen will indeed be deterred. Commercial speech may be hardy, as this Court has often said, *Bates, supra*, 433 U.S. at 383-84; *Virginia State Board of Pharmacy, supra*, 425 U.S. at 771-72 and n.24. It is not so hardy that it can risk broadside damage awards based on prophylactic policies retrospectively applied to what formerly were customary industrial practices.

Although this Court has often considered the question of the extent to which damage remedies may be used when other forms of constitutionally protected speech are involved, *e.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), it has not yet considered the extent to which they are permissible in regulating commercial speech. The recent decision in *Ohralik, supra*, held that a "prophylactic rule" could be the basis for administrative disciplinary sanctions without proof that the particular solicitation had worked actual injury. However, the assesment of damages, the sole legitimate purpose of which is to compensate for whatever injury actually occurred, obviously raises a different issue. To give guidance to the lower courts, and to administrative agencies, as to the limits on using damage remedies in the regulation of commercial speech, this Court should grant certiorari.

IV. This Case Raises Important Questions Concerning Application of the Doctrine of Tolling of a Federal Statute of Limitations by Reason of "Fraudulent Concealment".

The court below affirmed the finding of the Commission that BAR's violation of section 3(4) had caused damage commencing January 1, 1970, to MEC in the amount of $176,323 and to B&M in the amount of $86,917. In so holding, the court rejected BAR's contention that the appli-

cable statute of limitations, 49 U.S.C. §16(3)(b), bars recovery by the complaining carriers of a substantial portion of such damages.

49 U.S.C. §16(3)(b) provides that complaints to the Commission against carriers for damages other than for overcharges shall be filed with the Commission "within two years from the time the cause of action accrues, and not after". The complainants of MEC and B&M were not filed with the Commission until March 13, 1974 and July 8, 1974, respectively, so that BAR's contention, if sustained, would bar recovery of all damages incurred more than two years prior to those dates. However, the court below affirmed the Commission's conclusionary finding that as to both carriers the statute had been tolled by fraudulent concealment by BAR of the complainants' cause of action until MEC obtained in July of 1972 a copy of the written agreement between BAR and CP. (A-32 - A-34, A-40 - A-46.)

The court's conclusion that BAR was guilty of "fraudulent concealment" of complainants' causes of action by being "evasive" concerning certain legally irrelevant details of the arrangement with CP and by failing to provide to MEC, upon request by MEC, a copy of the written agreement with CP, is dubious, to say the least. However, the crux of the request for review by this Court with respect to the statute-of-limitations issue is the extraordinary conclusion of the court below that MEC's admitted awareness, at least as early as September 1970, of: (i) the BAR-CP agreement to solicit all possible traffic away from MEC-B&M; (ii) extensive solicitation pursuant thereto; and (iii) significant losses of traffic by MEC-B&M (App. A-7, A-33, A-41 - A-43), was not sufficient to give MEC and B&M knowledge, or reason to know, that they may have had a cause of action so as to commence the running of the statute. That conclusion is critical because even where there has been fraudulent concealment, the statute begins

to run at the time when "the plaintiff knew, or by the exercise of due diligence could have known, that he may have had a cause of action". *E.g., Westinghouse Electric Corp.* v. *City of Burlington*, 351 F.2d 762, 764 (D.C. Cir. 1965).

The decision of the court below appears to be the first by any federal court with respect to any federal statute of limitations which, in a case of fraudulent concealment, postpones the running of the statute until the plaintiffs arrive at "a *full appreciation* of the true scope and character of [the allegedly illegal] plan" (emphasis added) (App. A-44); until they know "*all* the facts" (emphasis added) (App. A-46); and until they have "the *entire* picture" (emphasis added) (App. A-46), including possession of "dramatic" pieces of evidence such as the written agreement between BAR and CP (App. A-34 n.18). This unprecedentedly rigorous standard of knowledge to trigger the running of a federal statute of limitations is sharply at odds with the far less stringent standard applied in every other reported federal decision, including other decisions of the First Circuit itself, under many different federal statutes of limitations. *E.g., Cook* v. *Avien, Inc.*, Civil Nos. 77-1106, 77-1107 (1st Cir., filed March 28, 1978); *Prather* v. *Neva Paperbacks, Inc.*, 446 F.2d 338, 341 (5th Cir. 1971) ("The bells do not toll the limitations statute while one ferrets the facts."); *Klein* v. *Bower*, 421 F.2d 338, 343 (2d Cir. 1970) (running of the limitations period did not await appellant's discovery of "the full 'enormity' " of the alleged scheme); *Japanese War Notes Claim. Ass'n of Phil., Inc.* v. *United States*, 373 F.2d 356, 359 (Ct. Cl.), *cert. denied*, 389 U.S. 971 (1967), *reh. denied*, 390 U.S. 975 (1968) ("Defendant is not required to wait until plaintiff has started substantiating its claims by the discovery of evidence. Once plaintiff is on inquiry that it has a *potential* claim, the statute can start to run." (emphasis added)); *Moviecolor Limited* v. *Eastman Kodak Co.*, 288 F.2d 80, 87

(2d Cir. 1961) ("Mere ignorance of evidence on which to establish a claim is not enough" to suspend the running of the statute of limitations).

In denying BAR's petition for rehearing with respect to the state-of-limitations issue, the court below did not even attempt to distinguish this case from the above cases (which had been cited to it), except its own recent decision in *Cook* v. *Avien*. The court acknowledged that the "storm warnings" standard of knowledge applied in *Cook* was different from the "all the facts" standard applied in this case (App. A-41—A-42). The court defended the use of different standards in the two cases on the ground that the nature of the private cause of action under section 3(4) was such as to call for a more stringent standard of knowledge than that for private causes of action under the securities acts. As factors supposedly supporting this distinction, the court cited the relative infrequency of section 3(4) claims, the relative complexity of section 3(4) claims, and the supposed unwillingness of a carrier to incur "the antagonism of shippers and sister carriers" by filing a section 3(4) claim until it had all the facts. Such factors, even if they were factually correct, are hardly unique to claims under section 3(4), and provide no valid basis for applying the statute of limitations under 49 U.S.C. §16(3)(b) any differently than any other federal statute of limitations.

Nor does the participation of the Commission, to whose "perception of the equities" the court gave "considerable deference" (App. A-46), support the court's result. A party claiming damages for violation of section 3(4), or any other provision of the Interstate Commerce Act, has his choice between proceeding initially before the Commission, as was done here, *or* in a federal district court without any resort to the agency. 49 U.S.C. §9. Even in the former case, the

Commission acts only as an initial fact finder, with the ultimate decision resting in the hands of a federal district court, which is not bound by the Commission's findings but need only give *prima facie* weight to them. 49 U.S.C. §16(2). As with damage actions under other federal statutes, the primary adjudicatory role lies with the district court. Clearly the Commission is not more expert on statute-of-limitations matters than the court.

The statute of limitations question here calls for review by this Court because the decision below is unprecedented and is at odds with many other decisions of many federal courts and because it raises the important question whether different tolling principles should be applied to different federal statutes of limitations.

Conclusion

For the reasons set forth herein, a writ of certiorari to review the decision of the Court of Appeals for the First Circuit should issue.

Respectfully submitted,

June 28, 1978

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 77-1082

BANGOR AND AROOSTOOK RAILROAD COMPANY,

PETITIONER,

v.

INTERSTATE COMMERCE COMMISSION,

RESPONDENT,

MAINE CENTRAL RAILROAD COMPANY, ET AL.,

INTERVENORS.

No. 77-1105

MAINE CENTRAL RAILROAD COMPANY,

PETITIONER,

v.

UNITED STATES OF AMERICA,

and

INTERSTATE COMMERCE COMMISSION,

RESPONDENTS,

BANGOR AND AROOSTOOK RAILROAD COMPANY,

INTERVENOR.

No. 77-1108

ROBERT W. MESERVE AND BENJAMIN H. LACY,
TRUSTEES OF THE PROPERTY OF BOSTON
AND MAINE CORPORATION, DEBTOR,

PETITIONERS,

v.

UNITED STATES OF AMERICA,

and

INTERSTATE COMMERCE COMMISSION,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
INTERSTATE COMMERCE COMMISSION

Before
CAMPBELL, *Circuit Judge*,
TUTTLE, *Circuit Judge*,*
WOLLENBERG, *District Judge*.**

Laurence S. Fordham, with whom *Verne W. Vance, Jr.*, *Scott C. Moriearty*, *Todd D. Rakoff*, *Foley, Hoag & Eliot*, *William M. Houston*, *Edward T. Robinson*, and *Gaston Snow & Ely Bartlett* were on briefs, for Bangor and Aroostook Railroad Company.

Peter J. Nickles and *Eugene D. Gulland*, with whom *Covington & Burling* and *Scott W. Scully* were on briefs, for Maine Central Railroad Company.

Sidney Weinberg for Robert W. Meserve and Benjamin H. Lacy, Trustees of the Property of Boston and Maine Corporation, Debtor.

Lee A. Monroe and *Sidley & Austin* on brief for intervenor Canadian Pacific Limited.

Charles H. White, Jr., Associate General Counsel, with whom *Mark L. Evans*, General Counsel, *John H. Shenefield*, Acting Assistant Attorney General, *Carl D. Lawson*, *Daniel J. Conway*, Attorneys, Department of Justice, and *Raymond Michael Ripple*, Attorney, were on briefs, for Interstate Commerce Commission and the United States.

March 30, 1978

CAMPBELL, *Circuit Judge*. These are consolidated petitions to review cease and desist orders and damage awards entered by the Interstate Commerce Commission in a report and order of February 4, 1977. 28 U.S.C. §§ 2321, 2342, 2344. The Commission's actions followed administrative proceedings concerning the legality of interchange arrangements between the Bangor and Aroostook Railroad Co. (BAR) and Canadian Pacific Ltd. (CP). Initiated in 1973 by the Commission itself, the proceedings focused upon complaints which Maine Central Railroad (MEC) and the Boston and Maine Corporation (B&M) filed in 1974 seeking

* Of the Fifth Circuit, sitting by designation.
** Of the Northern District of California, sitting by designation.

damages on account of BAR's purportedly unlawful preference of CP.

In agreement with an administrative law judge, the Commission concluded that BAR, "aided" by CP, had "unduly prejudiced Maine Central Railroad Co. and Boston and Maine Corporation . . . in the distribution of traffic in violation of section 3(4) of the Interstate Commerce Act [the Act]," 49 U.S.C. § 3(4).[1]

Acting under authority of § 16(1) of the Act, 49 U.S.C. § 16(1), the Commission held BAR liable in damages to the two complaining carriers. But the Commission's assessment of the amount of damages was considerably lower than the ALJ's. It ordered BAR to pay damages of $176,323 to MEC and $86,917 to B&M, with 4% interest.[2]

BAR here challenges the Commission's ruling that it was guilty of conduct violative of § 3(4). It also challenges the Commission's awarding damages to MEC and B&M and the amounts assessed. In separate petitions, MEC and B&M also contest the amount of damages, claiming that the ALJ's higher assessments should have been adopted.

We conclude that the Commission had ample basis to find that BAR violated § 3(4) and that its conduct damaged MEC and B&M. We also sustain the Commission's determination of damages. However, since we find the cease and desist orders to be overly broad, we vacate those orders and remand that aspect of the case for clarification.

I

At the heart of BAR's allegedly improper conduct is a formal agreement that BAR and CP concluded in July,

[1] That section reads in pertinent part that "all carriers . . . shall not . . . unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper."

[2] The ALJ, in his initial decision, had directed BAR to pay damages of $1,590,438 to MEC and $688,330 to B&M, with 4% interest.

1970, initiating a shipper solicitation program in an attempt to divert "as much traffic as possible" from MEC and B&M[3] onto BAR's alternative connecting line, CP. The facts we state are drawn from the opinions of the ALJ and the Commission. Except as noted, they are substantially undisputed.

BAR's track network spans 541 miles in Maine. It connects with CP at Brownville Junction, located 45.3 miles north of Northern Maine Junction, where BAR interchanges with MEC. MEC connects further on with B&M.[4] These four railroads skirt and cross the Canadian border in the northeastern reaches of Maine, offering alternative through routes for shippers with goods to be transported across the region. Paper, frozen vegetables, starch, clay, and woodpulp, primarily, are shipped over these lines. Depending on a shipper's origination and destination points, he may have the option of routing his traffic via BAR and CP, or via BAR with MEC and B&M.[5] BAR is primarily an originating carrier, receiving goods directly from shippers rather than from other railroads, and shipping them out toward destinations not reached by its lines.

In October of 1969, the Amoskeag Co., a company controlled by a "voluntary association" known as Dumaines, purchased 99 percent of BAR stock. Frederic C. Dumaine, who controls Dumaines, became a director and chief executive officer of BAR after the purchase. When this purchase was made, Amoskeag owned 26 percent of MEC stock as well; the Commission found that "word of an impending merger between MEC and BAR became widespread" after

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[3] B&M connects with MEC to complete the alternative through route.

[4] MEC also connects with CP and Canadian National Railway (CNR), on different through routes, apparently.

[5] The parties do not contest that CP, and MEC with B&M, are similarly situated "connecting lines" for purposes of the Act. *See Western Pacific Ry.* v. *United States*, 382 U.S. 237 (1965).

the acquisition. In early November, 1969, the president of BAR (who had stayed on at the request of Dumaine) asked that BAR's general freight manager prepare a traffic study showing which of the cars presently traveling via Northern Maine Junction could instead be interchanged at Brownville Junction, without modifying their destinations. A series of memos on this subject followed; most were passed on to Dumaine by the president of BAR, in late November and early December of 1969. The memos detailed the commodities and numbers of carloads that were subject to such a diversion; one set forth the estimated loss, about $2.8 million per year, that was predicted to accrue to MEC and B&M should all 24,000 such carloads successfuliy be rerouted. Another memo, circulated in mid-December, compared transit times for goods traveling the alternative routes, and showed little over-all difference between the two routes.

Negotiations between CP and BAR to arrange a cooperative effort in support of a freight diversion plan were initiated late in 1969, and continued through the first half of 1970. Salient features of the negotiations were BAR's undertaking to furnish CP origin and destination statistics of all traffic subject to diversion, CP's duty aggressively to solicit new traffic, and CP's agreement to expand and improve its interchange facilities at Brownville Junction in order to handle the expected additional traffic. CP also indicated by letter its understanding that any agreement regarding concerted solicitation efforts that was ultimately concluded would be "long-term and not subject to any reversal of policy" by BAR.

In mid-January, BAR investigated the potential financial impact on BAR of the proposed re-routing efforts: it compared the divisions that it would receive from additional traffic of different commodities when shipped over CP instead of over MEC. The investigation showed that diver-

sion would decrease BAR's revenues in some cases and induced CP to offer to pay BAR a "car allowance" for every additional car moving over its lines that would otherwise give BAR a diminished division.

After further discussion and correspondence, the terms of an agreement were reached in early June of 1970, and activity pursuant to that agreement intensified.[6] Under the heading *"PRIVATE"* a written confirmation of the agreement set forth *inter alia* that BAR had,

> "agree[d] to interline with CP Rail via Brownville Junction as many cars of paper products and potatoes as it is possible for it so to interline and anticipates that by reason of this agreement such interline traffic will be increased by approximately 24,000 cars annually as follows:
>
> *Forwarded to CP Rail*
>
> | | |
> |---|---|
> | Paper | 11,000 |
> | Potatoes | 4,500 |
> | Other | 3,500 |
> | Sub-total | 19,000 |
>
> *Received from CP Rail*
>
> | | |
> |---|---|
> | Misc. | 5,000" |

The agreement described the allowances that CP agreed to pay BAR on additional carloads of potatoes and paper products that would be interlined at Brownville Junction; those payments were to be made "quarterly by check through the Claims Section of the Auditor of Freight Claims". CP also formally undertook to improve its interchange facilities. Not specifically spelled out in the memorandum, but apparent from the correspondence and testimony regarding the negotiations of early 1970, was the

[6] BAR disagrees with the Commission on the timing of its solicitation efforts. *See infra*, IV(4).

commitment of both parties vigorously to solicit traffic on behalf of CP. The pact was to bind the parties over a fifteen year period; there was provision, however, for reopening and renegotiation every five years, on 180-day notice. The agreement was not formally executed until July 31, 1970, but it was by its terms to take effect retroactively, as of January 1, 1970.

The Commission received evidence that pursuant to this agreement, both carriers approached shippers, urging them to route their traffic over CP instead of via MEC. Though service differences such as transit time, reliability, and car supply were sometimes cited to the shippers in support of the solicitations, those comparisons do not appear to have been grounded in either fact or prior study.[7] BAR also "distributed suggested routes to the principal shippers on its lines. . . . All suggested routes were via Brownville Junction." CP and BAR personnel made some solicitation visits jointly, in search of more traffic for CP.

The sales efforts of BAR and CP coincided with a drop in traffic shipment over MEC that was marked enough to prompt MEC's inquiry of shippers and carriers about the possible reasons behind the decrease. As MEC became generally aware of the intensified promotion campaign on CP's behalf, MEC engaged in some counter-solicitation in an attempt to stem the tide, and evidently had some success. BAR's and CP's efforts continued in varying intensity over five years, until the agreement was terminated at CP's request on February 18, 1975, retroactive to January 1, 1975.

[7] BAR argues that the Commission "does not at any point in its decision state that, as a general matter, those factors [the comparisons] were misleading or invalid." This is accurate, but the import of the Commission's criticism fairly lay in the absence of conscientious comparison as foundation for these substantive recommendations, rather than in any truth they inadvertently stumbled upon.

II *Liability under § 3(4)*

Section 3(4) of the Act, entitled "Interchange of traffic", provides,

> "All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, *or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper.* As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title." [Emphasis supplied.]

49 U.S.C. § 3(4). In a rate discrimination case brought under the section, the Supreme Court has commented generally, "In the absence of any settled construction of § 3(4), . . . its manifest purpose to deprive railroads of discretion to apportion economic advantage among competitors at a common interchange must be the basic guide to decision." *Western Pacific Ry. Co.* v. *United States,* 382 U.S. 237, 244 (1965).

The Supreme Court has not had occasion expressly to construe the language in § 3(4) barring "undue prejudice" in the distribution of traffic. However, a three-judge court in *Southern Pacific Ry.* v. *United States,* 277 F. Supp. 671 (D. Neb. 1967), *aff'd mem.,* 390 U.S. 744 (1968), has interpreted this part of § 3(4) to prohibit a carrier from soliciting traffic preferentially, in favor of one connecting line over another:

> "The prohibition of Section 3(4) is against discriminatory conduct of the carrier against connecting lines. The Act cannot be circumvented by wrongfully inducing the shipper to commit the discrimination in place of the carrier. In other words, the legislation is not to be so weakly construed that it permits the carrier to accomplish indirectly what he cannot do by direct preferential routing. In view of the clear policy expressed by the statute, we see no meaningful distinction between arbitrarily soliciting the unrouted freight at that time and arbitrarily routing it should the shipper leave it unrouted. . . . '[T]here is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach.
>
> ". . . .
>
> ". . . [W]e feel that preferential solicitation when done on a 'preconcerted' and 'systematic' discriminatory basis, . . . falls within the statutory prohibition of Section 3(4) as well [as preferential routing]. The preferential solicitation dictated by the agreement is without concern for competitive benefits of similar lines and without relationship to the best possible service to the shipper. It is as much an apportionment of 'economic advantage' as direct routing itself."

277 F. Supp. at 685, *quoting Houston, East & West Texas R. Co.* v. *United States,* 234 U.S. 342, 356 (1914), and *Western Pacific Ry., supra.* It is to be noted that the judgment in *Southern Pacific* was summarily affirmed by the Supreme Court, although summary affirmance on statutory questions such as were there presented does not inevitably conclude future interpretations of § 3(4), *Mandel* v. *Bradley,* 432 U.S. 173 (1977) (per curiam); *Fusari* v. *Steinberg,* 419 U.S. 379 (1975) (Burger, C.J., concurring).[7A]

[7A] The parties agree that the issue of § 3(4)'s construction was presented to the Supreme Court in the appellants' jurisdictional statement.

We accept the district court's interpretation in *Southern Pacific,* and the Commission's similar construction in this case.[8] Section 3(4) addresses the "interchange of traffic." The proscribed act is "unduly prejudic[ing] a connecting line in the distribution of traffic." A defense is provided carriers who route traffic "specifically routed by the shipper," *New York* v. *United States,* 568 F.2d 887, 894 n.12 (2d Cir. 1977); this is consistent with other provisions of the Act that protect shippers' freedom. The other subsections within § 3(4) all speak to a carrier's obligation to afford even-handed treatment to its connecting lines, except room is allowed for different treatment when warranted by so-called "service considerations." The provision seems obviously meant to avert the anti-competitive effects of a powerful or well-positioned carrier using its influence and position in favor of one connecting line over another, and thus skewing the market as that market is structured under the Act.

Especially in light of *Southern Pacific,* we think the lan-

[8] Interpreting §3(4) is a question of law, "ultimately to be decided by courts," *Ferraro* v. *INS,* 535 F.2d 208, 209 (2d Cir. 1976), *see* 5 U.S.C. § 706(2)(A)(C). Although the precise contours of the standard of review to be applied to an agency's construction of its enabling statute are subject to varying formulations, *compare United Housing Foundation, Inc.* v. *Forman,* 421 U.S. 837, 858 n.25 (1975) (entitled to "considerable weight"), *with Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 381 (1969) (follow unless there are "compelling indications that it is wrong"); *Zemel* v. *Rusk,* 381 U.S. 1, 11-12 (1965) ("must be given weight"); *United States* v. *Public Utilities Commission of California,* 345 U.S. 294, 314 (1953) (Court's "sympathy" with established administrative interpretations), where an agency's interpretation of the statute it is charged with enforcing is consistent with the statute's language and evident Congressional purpose, we accord it some deference:

> "Our charter is limited . . . . [A]t least . . . if the agency's interpretation can be seen, without straining, to be consistent with the statutes, we should accept it."

Silva v. *East Providence Housing Authority,* 565 F.2d 1217, 1218 (1st Cir. 1977).

guage of the statute put BAR fairly on notice that its conduct was prohibited.[9] BAR, primarily an originating carrier, waged a broad-gauged and long-term solicitation campaign in support of only one of its connecting lines, CP. There is substantial evidence supporting the Commission's finding that the sales effort was initiated, and continued, not on the basis of any markedly superior service (i.e. "service considerations") that CP furnished its shippers, but rather for some other motive. The evidence indicated that in the study of comparative transit times undertaken prior to BAR's broaching the possibility of joint solicitation with CP, no one carrier demonstrated a distinct advantage. Until after the negotiations had begun, BAR attempted no assessment of the reliability of alternative carriers, nor even of BAR's own divisions in the rates of commodities shipped over the two available routes. An examination of the latter subsequently revealed that BAR itself would *lose* revenues on potatoes and paper products should those goods be interlined with CP rather than with MEC, causing CP to agree to pay BAR so-called "car allowances" for diverted traffic. The facilities of CP did not dictate that it would be in every shipper's interest to ship via CP: CP had to expand and upgrade its interchange facilities with BAR as part of the agreement to solicit the divertible traffic.

[9] BAR complains not only that the statute does not reach its conduct — an argument which, in its various aspects, we entirely reject, *infra* — but also complains that the Commission fails "with sufficient clarity to guide BAR's future conduct, or to permit effective judicial review of the Commission's order," in that it does not delineate "what BAR did that violated § 3(4)." We agree that the Commission's opinion contains some puzzling aspects and for that reason refuse to affirm the cease and desist order, *infra.* But we do not agree with BAR's contention that the kind of aggressive solicitation which it undertook for, and in conjunction with, CP, was not clearly violative of § 3(4); nor do we find the Commission's findings as to that violation to be so unclear as to be unreviewable.

Further, BAR points in its brief to no specific instances where BAR's recommendations to shippers were individually tailored according to service considerations. BAR's solicitation efforts were uniformly on behalf of CP. Its undertaking was to solicit "all traffic possible" for CP, not just traffic that CP could, objectively, handle better than others. The agreement BAR entered into with CP committed it to seek traffic on behalf of CP over a fifteen-year period, without provision for release in less than five years. Should CP's service have deteriorated, BAR remained obliged to solicit on its behalf. The agreement was a secret one; the "car allowances" CP was to pay BAR appear to have been concealed as freight claim payments. BAR favored CP by providing it with a detailed list of shippers and commodities originating on BAR lines; BAR distributed no such lists to other carriers as a matter of policy. This cannot conceivably constitute even-handed treatment in the distribution of traffic.

Post hoc characterization of these activities as salutary promotion of competition through fair-minded recommendations to strong and sophisticated shippers is implausible. Though the Commission made no express finding that these solicitations were fraudulent or coercive, nor that competition, as distinct from competitors, was injured by the campaign, its findings did not reveal the impartial approach toward connecting lines in the distribution of traffic that is required of an originating carrier by § 3(4).

We therefore have little hesitancy in upholding the Commission on the facts of this case. In so doing, we go no further than to support a ruling that active and deliberate solicitation by an originating carrier for one or more of its connecting lines, to the plain neglect and detriment of other connecting lines, violates § 3(4) of the Act, when such solicitation is not supported by a significant service differential between those carriers (or any other specific

exception grounded in the Act)[10] that objectively could justify a departure from impartial treatment.

While this construction of §3(4) seems clear enough, BAR disagrees, and has launched a multi-faceted attack on both the Commission's interpretation and application of the section. First, with CP, it urges that the traffic that it solicited was "specifically routed by the shipper," in that it arrived at BAR's loading platforms, for example, with routing instructions signed by the shipper. BAR argues that it merely followed the shippers' instructions when it routed the solicited traffic via CP. Moreover, BAR claims to have been *prohibited* by § 3(4) from rerouting that traffic in derogation of the shippers' wishes. BAR relies correlatively on sections 15(10), 15(11), and 15(12) of the Act, 49 U.S.C. §§ 15(10), 15(11), 15(12), as exemplifying Congress' intention to protect "unfettered shipper choice,"

[10] We leave open the possibility that solicitation by an originating carrier could in some circumstances find a legal justification in factors other than service differential. There may be other facets of the Act, or Commission policies present or future, affording a proper basis for different exceptions to the general rule requiring impartial treatment. Such a possibility is at least suggested in the language of the Commission's report which refers intriguingly to preferential solicitation agreements "that are to a certain extent commonplace in the railroad industry," and also recognizes a railroad's soliciting of its "best revenue routes," leaving it unclear whether such solicitation would be approved by the Commission even though preferential.

But while the outer limits of § 3(4) in other circumstances are thus obscure, we see no uncertainty about § 3(4)'s application to the "hard core" conduct here in question. *See Broadrick* v. *Oklahoma*, 413 U.S. 601, 608 (1973). No exceptions of the sort we have in mind, *i.e.* specific exceptions with a technical basis in the Act or in Commission policies, have been identified as affording BAR an escape hatch. BAR does say that in years past it entered into agreements with complainants and others comparable to the one with CP, but the record does not bear out its contention of comparability. And it is no defense that the Commission has not policed § 3(4) aggressively, in the absence, at least, of a showing that the Commission has actively licensed conduct of the sort BAR has engaged in.

and submits that to construe § 3(4) as prohibiting BAR from routing in accordance with shippers' instructions would "make a mockery" of § 15(10), and conflict with the purposes of the Act.

We find no merit in this argument. Section 3(4), while consistent with the subsections of § 15, does not blindly deify "shipper choice." Its focus is inter-carrier relations. The shipper choice that BAR relies on in its defense was tainted by BAR and CP's solicitation efforts, which were not founded upon the shippers' service interests, and provides no satisfactory justification of the systematic favor BAR bestowed on CP.

BAR objects that no inquiry was made into whether the prejudice suffered by MEC and B&M was "undue." It contends that "undue" prejudice refers to injury incurred as a result of harm to competition, drawing an analogy to antitrust law. But while the Commission has characterized the statute as "pro-competitive", that characterization does not thrust § 3(4)'s construction into the thick of antitrust doctrine. BAR's analogy asks too much. Undue prejudice may refer to a disadvantage to a connecting line that is unwarranted by service considerations. Such harm to connecting lines as may result from a carrier's breach of the strictures of § 3(4) are recoverable in damages under the terms of the Act without an independent assessment of the state of "competition" in the market, and the Commission is empowered to make such an award. 49 U.S.C. §§ 8, 13(1), 16(1).[11] And as the Commission noted, it is

[11] "§ 8. Liability in damages to persons injured by violation of law

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions

"inapposite for BAR and CP to maintain that the BAR-CP agreement promoted competition when a normal competitive situation presupposes that each connecting line has equal advantage and opportunity to solicit shippers."

BAR further urges that its soliciting activities and agreement with CP were not shown to have "distributed traffic." It says that it would be illogical to conclude that the ultimate routing instructions given by the shippers on each of the thousands of shipments reflected BAR's choice rather than the shipper's choice. But while it might be possible

of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

"§ 13, par. (1). Complaint to Commission of violation of law by carrier, reparation; investigation

Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complaint only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

"§ 16. Orders of commission and enforcement thereof

Award of damages

(1) If, after hearing on a complaint made as provided in section 13 of this title, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

for a minor connecting carrier to maintain that its solicitations on behalf of another connecting line did not carry enough weight to amount to "distribution", an originating carrier such as BAR, controlling many miles of track by which shippers gained railway access to various destination points, could reasonably be found to command a position from which it exerts substantial influence over shippers' choice of routes, regardless of a shipper's experience or sophistication.[12] This is not to say that an originating carrier necessarily controls its shippers—it may depend on them collectively as much as they on the carrier—nor that a carrier could sanction noncooperative shippers by simply refusing them service—other sections of the Act limit a carrier's power in dealing with shippers; but a shipper might well feel compelled to cooperate with an originating carrier rather than incur its disfavor. Further, BAR and CP instituted and carried out a systematic program of solicitation, pursuant to agreement, rather than sporadically asking for business in a few instances. We see no reason not to characterize this as an effort to "distribut[e] traffic" in contravention of § 3(4).

Last, BAR asserts that the Commission's reading of the statute conflicts with the first amendment of the United States Constitution. This contention was not raised before the agency, but even assuming it is now open we see no merit in it. Though first amendment protection has lately been afforded some types of commercial speech, *see Bates* v. *State Bar*, 433 U.S. 350 (1977) (attorney advertising); *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85 (1977) (residential "for sale" signs); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (advertising of drug prices), the first

[12] For example, the Commission cites one instance where Great Northern, one of the major shippers over BAR lines, asked the president of BAR "whether BAR would be disturbed if Great Northern routed more traffic by CP." This does not suggest a lack of consideration for an originating line's views.

amendment has not yet been held to limit regulation in areas of extensive economic supervision, such as the securities, antitrust, and transportation fields, where the exchange of information can be a vital element in an illegal scheme. Shaping the regulation of "speech" in those areas is more a matter of policy development than one of constitutional right; it lies most appropriately with Congress and the regulatory agency. Even if some language in the above-cited cases may have seemed to herald a new era of first amendment law, *see Virginia State Board of Pharmacy, supra* at 762, the revolution has yet to envelop the transportation field to the extent asserted.

Moreover, unlike the statutes questioned in the cases cited by BAR, the challenged construction of § 3(4) does not dictate silence on the part of carriers. It does not prevent an originating carrier from providing information of any and all sorts to shippers on an even-handed basis. It does require that an originating carrier make good faith efforts to ascertain the accuracy of purported "information," and it limits the pressure that an originating carrier may put on a shipper. Without demonstrable superiority of a connecting line, an originating carrier, in its influential position, is precluded from sponsoring that line. *Cf. Bates* v. *State Bar, supra* at 4904. It is hard to see how this standard does violence to first amendment values.

In the present case, despite the absence of an express ruling that BAR's solicitation included statements that were fraudulently or deceptively made, the Commission's opinion leaves little doubt that BAR's statements were at least misleading. That a few of the statements were discovered after the fact to have been inadvertently accurate offers no justification for BAR's manifestly unequal treatment of CP and MEC, and does not rebut an overall judgment that the solicitations were recklessly made.

Finally, we dismiss BAR's argument that the Commis-

sion's findings were not supported by substantial evidence on the record viewed as a whole. Though BAR can point to portions of the record that might have justified findings different from the Commission's, the Commission could properly choose to rely on the evidence that it found most trustworthy and plausible. *Consolo* v. *FMC*, 383 U.S. 607, 620 (1966). Its conclusions derive substantial support from the record: this is the test they must satisfy. *Illinois Central RR. Co.* v. *Norfolk & Western Ry. Co.*, 385 U.S. 57, 66, 69 (1966); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951); 5 U.S.C. § 706(2)(E).

III *Damages*

1. The Commission's method of calculation.

To calculate the extent of the damage to MEC and B&M resulting from BAR and CP's unlawful conduct, the Commission applied a "before and after" test. It projected the expected market shares of the two carriers in certain divertible commodity traffic on the basis of pre-violation market figures, and compared those shares with the actual market shares enjoyed by MEC and B&M over the period from 1970 through 1974, when the unlawful activity was in progress.[13] The market share differential was then translated into terms of carloads lost by the carriers for each commodity. Each carload of a given commodity was assigned a figure representing the average gross revenue brought in by such carloads. To each carload was also attributed a portion of the carrier's operating

[13] The Commission found that similar projection of market shares for clay and woodpulp traffic would be speculative because the figures available to it concerning the traffic in those commodities prior to the violation were too limited. It therefore did not award damages for lost traffic in those goods.

We discuss *infra* BAR's contention that, whatever the justification for damages after mid-1970, there was no evidence of harmful conduct in the first half of 1970.

expenses, including certain overhead costs which were determined in accordance with guidelines developed in rate-making procedures before the Commission. These costs were integrated into the damage formula by application of certain "operating ratios" calculated in standard fashion by the Commission; those ratios reflect the proportion of expenses to revenues in traffic of a given commodity. The Commission totaled the estimated net revenues lost per carload in each type of traffic, combined with the number of carloads lost per commodity by virtue of BAR's conduct, to give a monetary estimate of the injury suffered by MEC and B&M. The Commission attempted to exclude from its calculation, traffic that originated or terminated on MEC, B&M, or CP, since that traffic would not have been subject to diversion. B&M's damages were assessed essentially as a proportion of MEC's award. *See infra.*

2. Damages—The carriers' primary objections

All three carriers complain at length about the Commission's computation of damages. BAR strenuously argues that no damages at all should be recovered by MEC and B&M. It says that the proofs relied on by the Commission and proposed by those carriers are "purely speculative" and fail to satisfy the standards of proximate cause required in a court of law. We find this contention without merit. A similar "before and after" comparison of market shares has been accepted in antitrust litigation when more precise measurements of the plaintiff's damage would be too burdensome or are unobtainable for some other reason. *See, e.g., Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Haverhill Gazette Co.* v. *Union Leader Corp.*, 333 F.2d 798, 804-07 (1st Cir.), *cert. denied*, 379 U.S. 931 (1964). BAR contends that by examining interchange reports for Brownville and Northern Maine

Junctions over 1970-74 and interviewing shippers, the injured carriers could and should have reconstructed unlawful solicitations and the shippers' state of mind with regard to individual shipments in order to arrive at a precise count of shipments that were unlawfully diverted. But such an investigation would have required combing through the records of more than ten thousand shipments in each year of the five-year period. The difficulty of the task has been augmented by BAR's destruction, since the violation, of interchange information concerning the destinations of the diverted freight, as well as of the computer printouts on shippers that BAR passed on to CP. The law does not demand that injured parties be so burdened. The wrongdoer could be required to bear the risk of uncertainty in the calculation of the number of carloads diverted by its actions, *see Story Parchment, supra* at 563-65. The Commission supportably found that MEC and B&M had met the burden of establishing "some resultant injury" from the § 3(4) violation.[14] This was a rational inference, for, as the ALJ explained,

> "[t]here are no facts of record which evidence service superiority in movements via Brownville Junction over Northern Maine Junction. In 1969 the transit times via the two interchange points were comparable. Routing changes resulting from carrier rate adjustments and concessions are short term and occur in both study and compared periods. There is no evidence of any abnormal market trend in the compared periods which affected originations and terminations on BAR. Nor is there any evidence of changes in supply sources and sales outlets that required elimination of MEC

[14] We do not accept BAR's characterization of the Commission's statement as a "flimsy finding". The Commission seems to have meant, simply, that the fact of damage had been proved, without implication concerning the extent of damage.

> or MEC and B&M participation as intermediate carrier or carriers in the movements. What were present in the 1970-74 periods which were not present in 1969 were (1) the BAR-CP agreement and solicitation campaign and (2) the Great Northern-CP 100 car a month agreement."[15]

Once the fact of injury was demonstrated, the Commission was authorized to determine if "any party . . . is entitled to an award of damages under the provisions of this chapter for a violation thereof." 49 U.S.C. § 16(1). The method of assessing the damages to be charged to BAR became a matter for the Commission's reasoned judgment, based on its expertise in the field. *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953); *see Bagel Bakers Council* v. *NLRB*, 555 F.2d 304, 305 (2d Cir. 1977). The Commission had merely to settle on a reasonable and rational method of computation, *see Bagel Bakers Council, supra.* We must defer to its choice among rational methods. *NLRB* v. *Seven-Up Bottling Co., supra.* The Commission's decision to award damages for this § 3(4) violation, with its reasoned conclusion as to their measurement, reflected a policy choice peculiarly within its realm. *See* 49 U.S.C. § 12; *Consolo* v. *FMC, supra,* 383 U.S. at 620-21 (1966); *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156 (1962); *United Van Lines, Inc.* v. *ICC,* 545 F.2d 613 (8th Cir. 1976); *cf. American Power and Light Co.* v. *SEC,* 329 U.S. 90 (1946); *Maine Potato Growers* v. *Butz,* 540 F.2d 518 (1st Cir. 1976). *See generally* 4 Davis, Administrative Law

[15] This was an agreement reached in late 1969 between CP and Great Northern Paper Co. (GN), a major shipper of paper over the routes in question, in which GN committed itself to ship 100 additional carloads a month over CP lines in return for CP's guarantee of furnishing BAR 100 additional cars a month for GN's use. *See infra.* (CP agreed to provide GN with "5 cars per day on a seven-day a week basis," making a total of about 460 per month, compared with 360 cars per month previously routed over CP lines.)

Treatise § 30.10 (1958). Applying these principles, we disagree with BAR that the Commission's methodology was outside acceptable limits, as providing a reasonable yardstick for estimating the harm visited on MEC and B&M by BAR's actions.

While BAR seeks elimination or reduction of the award, the injured carriers seek reinstatement of the ALJ's higher assessments. Thus they ask us to remand the case with instructions to reinstate the ALJ's decision and award. However, it is not our province to choose between the awards of the ALJ and the Commission. Any review of the ALJ is only incidental to our review of the Commission's decision. *See* 28 U.S.C. §§ 2321, 2342, 2344. The Commission was in no sense bound by the ALJ's recommendation. "An agency loses no power of decision by having an administrative law judge preside at a hearing." Davis, Administrative Law of the Seventies (1976 Supp. to Administrative Law Treatise) §10.03 at 313. *See Adolph Coors Co.* v. *FTC*, 497 F.2d 1178, 1184 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). A reviewing court may consider the decision of the ALJ as part of the record, but, except on matters of credibility, it is due little deference when the Commission has made an independent evaluation that is substantially supported by the evidence. *See United States Retail Credit Ass'n, Inc.* v. *FTC*, 300 F.2d 212, 216-17 (4th Cir. 1962).

Thus the question before us is not whether the ALJ's approach was, in our view, better, but simply whether the Commission's method of computing the extent of the carriers' injury was rational. As regards the latter question, the injured carriers are not persuasive in arguing that it was not. MEC and B&M maintain that their projections of market share (which the ALJ accepted) based on the percentage of the market held by each during 1969, a one-year period, should not have been rejected by the Commission. The Commission, however, deemed those to be speculative,

and made independent market share projections, based on market share figures for the preceding five to eight years. Where a trend was evident, the Commission extrapolated from the figures according to the trend; where no increasing or decreasing market share appeared, the Commission averaged the statistics for the preceding years and applied that simple average as a constant estimated market share during the period of the violation in order to evaluate the carriers' loss as indicated by the traffic that was actually shipped over their lines during that period. Where figures were not available for more than a one or two-year period before the violation, the Commission declined to award damages, finding the projections based thereon "purely speculative." (As noted above, this was the case for traffic in clay and woodpulp). Even if, as MEC and B&M maintain, a finding of wilfulness would have warranted applying a more lenient burden of proof on MEC and B&M as to the extent of their injury, this principle does not require that an alternative method, perhaps a more accurate method, be abandoned because a rougher calculation might do. In its report, the Commission examined the alternative methods proposed by the carriers, explained its reason for rejecting them, and set forth in some detail the analysis it chose to rely on. We cannot say as a matter of law that these methods were unreasonable nor that the Commission was bound to accept less definite projections. Application of the before and after test itself represented an accommodation to plaintiffs' difficulty in the precise proof of damages. The Commission was not required to award damages on the roughest version of the already imprecise measurement.

Equally unpersuasive is MEC and B&M's challenge to the Commission's use of an average cost rather than incremental cost analysis in its computation of the expenses that the carriers would have sustained had they handled the diverted traffic. MEC maintains that no overhead costs

should have been attributed to the additional traffic to determine the net revenues lost by the diversion; thus, it urges that we must find error in the Commission's application of the operating ratios. But the Commission responds that it was forced to use the operating ratios because the cost data offered by MEC was deficient. The result was that "each carrier [was] entitled to the same earnings on the projected traffic that was diverted as they [were] on all other traffic." We are unable to say that the approach taken was unreasonable. *See generally Seven-Up Bottling, supra.*

MEC further complains that it should have received an award of 8% interest on the damages due it. The Commission is empowered to award interest on the compensatory recovery. *Louisville & Nashville RR Co.* v. *Sloss-Sheffield Steel and Iron Co.*, 269 U.S. 217, 239-40 (1925). Its decision is not for us to disturb except in the face of abused discretion. *See, e.g., George Allison & Co.* v. *ICC*, 107 F.2d 180 (D.C. Cir. 1939), *cert. denied*, 309 U.S. 656 (1940). While its award of interest at 4% is lower than the current commercial rate, both MEC and B&M appear earlier to have sought only 6% interest and the carriers failed to object to the ALJ's decision to award only 4% interest. Given these facts and the breadth of the Commission's discretion with respect to the awarding of any interest at all, *see George Allison & Co., supra*, we are not persuaded that the Commission's low award exceeded its discretion.

The injured carriers also question the Commission's methodology in reducing B&M's award from the sum originally calculated by the ALJ. The Commission discovered that the method it had relied on in recalculating MEC's costs and projecting its market share over the period of the violation could not be employed to analyze B&M's loss, since the data concerning B&M's routes and traffic could not be similarly parsed. It concluded that a sufficiently

certain award could be determined by taking B&M's original calculation of loss, which had been constructed on terms parallel to MEC's calculation, and reducing it in the same proportion that its recalculation of MEC's loss prompted reduction of MEC's award. Thus, if the Commission determined that MEC's original claim on starch traffic overstated its ascertainable loss by 10 percent, for example, then the Commission would diminish B&M's claim on starch traffic by 10 percent to arrive at its award. Since B&M derived its divertible traffic from MEC, the presumption that their losses would be proportionate does not strike us as unreasonable.

B&M challenges the Commission's failure to make its reduced damage award sensitive to B&M's assertedly rising share of MEC/BAR traffic, and reasserts that its own proposed calculations were sufficiently definite to support an award. But the Commission ruled that projections of market share based on one year of data were speculative, in that they unjustifiably presume the share will remain constant. That reasoning, which we have already upheld, placed the Commission in a position where it could award nothing to B&M, for lack of proof on the extent of injury, or try to develop a reasonable accommodation. It attempted the second alternative, with an acceptable, if somewhat rough, result. It is possible to debate the particulars of the method adopted. That the award did not explicitly take account of B&M's allegedly growing market share of MEC traffic does not seem to us fatally to skew its result, especially since the "growing" market share asserted by B&M is also based on rough calculations. In the circumstances, we find the analysis of B&M's damages to have constituted a reasonable exercise of the Commission's authority to "determine the amounts to which a carrier is entitled" under § 16(1) of the Act. We therefore affirm that part of the award.

We return now, in reviewing the damages awards, to certain of BAR's challenges to specific items. BAR questions the correctness of the Commission's recompensing MEC and B&M for traffic diverted as a result of CP's, rather than BAR's, solicitation efforts. It argues that CP's own solicitation was within the protection of the Commission's ruling that a carrier may freely solicit on its own behalf under § 3(4). But while CP itself might well be so protected, the Commission was entitled to find that BAR had "unduly prejudice[d]" the two connecting carriers not only by means of its own solicitation for CP, but by abetting CP's solicitation. Section 3(4) prohibits BAR, as the originating carrier, from throwing its weight exclusively behind the solicitation campaign of one of its connecting lines to the detriment of other connecting lines. BAR's plan provided for intensified solicitation by CP as well as itself, and expansion of CP's interchange facilities to handle additional traffic. BAR aided CP's effort by providing CP with information concerning shippers, manipulating its boxcar supply as described in the Commission's opinion, and coordinating its own soliciting efforts with CP's, occasionally approaching shippers together. If CP had independently increased its solicitation effort, BAR would of course not be responsible for its results. But as CP's efforts were instigated, encouraged, planned and participated in by BAR, and as § 3(4) prohibited BAR's furnishing this kind of support on a preferential basis, BAR must accept responsibility for the results of CP's actions, and was properly held liable for them. A tortfeasor is liable for all the foreseeable consequences of his action. *See generally* Prosser, Law of Torts § 42 (4th ed. 1971).

3. Damages — The Great Northern-Canadian Pacific Agreement

Pursuant to an agreement with CP made in December 1969, Great Northern Paper Co. (GN), a major shipper located in Maine along BAR's line, undertook to ship about 100 more cars monthly via CP's Brownville Junction route. In return GN was to be assured 100 additional empty cars per month by CP. This additional traffic was included by the Commission in its damages calculations against BAR even though GN, not BAR, had initiated the arrangement and although the arrangement preceded by over six months the execution of the formal solicitation agreement between BAR and CP.

While the question is close, we think the record sufficiently supports the conclusions of the ALJ and Commission that this diversion of traffic, which began while BAR, after being acquired by Dumaines, was undertaking a program to divert traffic to CP, and which continued in effect for several years after the solicitation arrangement was instituted, was an outgrowth of BAR's wrongful conduct. GN's primary aim was to be assured of a ready supply of boxcars of the right type, at a time when it feared a BAR takeover of MEC, which might divert some of BAR's stock to MEC's more depleted lines. CP's aim, of course, was to increase its traffic. There was evidence from which the Commission could determine that from the early stages of the arrangment BAR played a key, and not disinterested, role in facilitating the arrangement by itself providing the box cars which CP was supposed to furnish, thus relieving CP of its obligation; GN, in the meantime, observed its end of the bargain with CP by shipping the extra loaded cars via CP's Brownville Junction, thus accomplishing BAR's objective of diverting traffic away from MEC. Indeed, BAR notified CP early in January of 1970 that

CP could be assured of the additional traffic but would not have to furnish any of the equipment. BAR included the traffic diverted under the GN-CP agreement in its estimates of the total number of cars it could divert to Brownville Junction, and, under the BAR-CP agreement, was to receive car allowances from CP for at least some of that traffic.

There was evidence, moreover, that in the fall of 1969 BAR's president helped stimulate the CP-GN arrangement by advising GN, unjustifiably it might be thought, that MEC had played a lead role among all the carriers in proposing a so-called "arbitrary" (a rate increment) which would have adversely affected GN and greatly irritated its management. One of GN's motives in the CP arrangement was to strike back at MEC for this. In brief, it could be found that BAR's role in the GN-CP arrangement was substantial if covert, and that the arrangement was nurtured by the same design to prejudice MEC in the distribution of traffic that came to flower in the June agreement. *See Haverhill Gazette Co.* v. *Union Leader Corp., supra,* 333 F.2d at 804-07.

It is true that GN's people denied being solicited by BAR prior to making the CP arrangement; but they acknowledged full awareness of the jockeying going on between Dumaines, BAR and MEC, and they were plainly concerned over any possible effect on car supply. It could be inferred that GN, being dependent on BAR's line, wished to remain in BAR's good graces at all times. The ALJ and Commission, having heard the extensive testimony and with greater knowledge of the industry than ourselves, were equipped to determine from all the circumstances, including the timing and BAR's role in underwriting the GN-CP arrangement by furnishing (and even purchasing 100 new, special-type) boxcars, whether what took place should be attributed to pressures emanating from BAR's grand design to divert traffic from MEC, or whether instead it was a mere coincidence that an arrangement dovetailing so well into BAR's plan had come into being.

4. Damages — the period from January to June, 1970

BAR complains that the Commission erred in awarding damages for the period from January 1, 1970, to June, 1970, before BAR and CP reached final agreement on the terms of their pact. However, we find substantial evidentiary support for the earlier award. When the BAR-CP agreement was executed in July, it was made retroactive to January, 1970. CP thus became liable to compensate BAR for all additional traffic flowing over CP lines from January to June, the increase to be measured by comparison with the previous year's traffic. The Commission could permissibly view this as an admission by BAR that its own actions were fairly related to any increases after the first of the year. There was evidence, also, that in February, 1970, BAR furnished CP with otherwise undistributed information concerning BAR's shippers, in aid of CP's ongoing solicitation effort.[16] There is, besides, the evidence already discussed of BAR's role in the diversion of Great Northern traffic from MEC to CP lines in late 1969, and early 1970. The Commission noted one specific instance, occurring in March 1970, where a CP solicitor suc-

[16] BAR maintains that this information was furnished CP "on the understanding that CP would not use the printout material until an agreement had been worked out." Aside from the absence of a record reference for this alleged understanding and the fact that the information was provided months before the agreement was formalized, the inference that CP may have used this information in its admittedly ongoing solicitation efforts does not seem far-fetched, and was open for the Commission to make. Even if CP did not attempt new solicitation before June on the basis of that information providing CP this data — an accommodation not offered to MEC nor to other connecting lines of Bar — evidenced prejudicial conduct vis-a-vis the other carriers, and taken with the other proof justified the earlier award.

cessfully persuaded a shipper to divert its freight to CP routes. Also, the first of MEC's inquiries into the reasons behind its decreased traffic came in the early months of 1970. While it appears that BAR and CP's campaign in all its facets did not begin in earnest until June, 1970, there is ample basis for the Commission's award to include compensation for traffic lost during the first five months of that year.

5. Damages — Official notice

The carriers raise several objections to the Commission's procedures affecting the calculation of damages. All contend that the Commission erred in taking official notice of figures filed by the carriers with the Commission, compiled in "Quarterly Commodity Statistics" (QCS) reports. Those statistics represent the numbers of carloads of various commodities that traveled over different lines during a given period of time. Though no carrier disputes the accuracy of the figures which they submitted to the Commission, they do take issue with the Commission's using them in its damages calculation, as a source for its projections of market share. They request remand on the issues of damages for this reason. (MEC suggests alternatively, as discussed above, that we order the Commission to reinstate the damage order of the ALJ.)

We agree with the Commission that the parties have forfeited their right to object to the use of this data. The Administrative Procedures Act gives a party a right to object to the use of official notices when such an objection is *timely* filed. 5 U.S.C. § 556(e). The relevant Commission rule for reopening, 49 C.F.R. § 1100.101(e), provides,

> "Except for good cause shown, and upon leave granted, petitions under this section [entitled petitions for rehearing, reargument, or reconsideration] must be filed within 30 days after the date of service of a decision or order, . . ."

BAR filed a petition for review of the order before this court, thus depriving the Commission of jurisdiction, 28 U.S.C. § 2349, on February 11, 1977, the day the order was served. Two months later, on April 21, 1977, BAR requested this court's permission to file a petition to reopen the ICC proceedings "for the receipt of additional evidence and argument concerning matters of official notice", *i.e.*, the QCS reports. MEC and B&M both filed oppositions to BAR's request, and this court denied the request. Now, MEC and B&M join with BAR in contesting the Commission's use of the statistics. While the ground is doubtless technical, we are not disposed to relieve BAR of non-compliance, and we have even less sympathy for the other carriers. The need for a rule of timeliness becomes especially apparent in a complicated case such as this. Presenting a technical matter first to the Commission would have afforded the Commission the opportunity to explain and reconsider its methodology, clarifying its reasoning in pertinent ways, if not dispelling the parties' doubts, before being subject to judicial scrutiny. *Cf. Presque Isle TV Co., Inc.* v. *United States*, 387 F.2d 502, 504-06 (1st Cir. 1967); Davis, *Administrative Law Treatise* § 20.06 (1958). From the papers filed in this court, we observe no manifest injustice to have been caused by the Commission's use of the figures. The Commission identified the source of the data and adequately explained its application of the statistics. *Compare Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292 (1937).

In a related vein, MEC and B&M complain of the Commission's alleged failure adequately to explain the source and methods for the derivation of the market shares that it attributed to MEC and B&M in its calculation. They also urge that it was error for the Commission not to set

forth in detail the calculation of the projected market shares done pursuant to the trend analysis. These errors, it is claimed, make this part of the report unreviewable, and hinder the carriers' evaluation of its accuracy. The methods and general theory of calculation are set forth in the Commission report, with its attached appendices, sufficiently for this court to review. We find the Commission to have employed a reasonable and comprehensible analysis of the changing market patterns. All the details of tabulating shipments do not need to be set out so long as their sources are indicated; the Commission need not append all its accounting data and worksheets to establish the essential reasonableness of its calculation. The other aspect of the carriers' analysis we find sufficiently bound up with their official notice claims to dispose of on the same grounds: they should have made timely objection to the Commission, which could have furnished them with the appropriate worksheets and entertained any objections the carrier might have cared to lodge.

6. Damages — The Statute of Limitations

Finally, BAR submits that the Commission should not have tolled the two-year statute of limitations prescribed in § 16(b)(3) of the Act, and should therefore have limited MEC and B&M's recovery to the two year period immediately prior to the filing of their complaints in 1974. The Commission implicitly found, and now argues in its brief, that MEC and B&M did not learn of the existence of a cause of action until 1972 when the terms of the BAR-CP agreement came to the attention of MEC's president. It further found that the injured carriers had exhibited reasonable care and diligence during the period of 1970-72, in their efforts to uncover the reason behind the decline in traffic shipped over their lines. Its auxiliary conclusion that BAR and CP were less than straightforward with MEC

and B&M about the essential terms of their agreement can fairly be discerned from its report. Revelation of those terms might have led to earlier institution either of suit by the carriers or of investigation by the Commission.

The evidence before the Commission showed that MEC and B&M repeatedly wrote letters and made oral inquiry of shippers and carriers in pursuit of the agent of their sudden adversity. However, while the carriers' investigation uncovered the intensified sales effort by CP and, possibly, by BAR — enough to trigger a counter-solicitation effort by MEC — the full extent of BAR's design remained hidden until disclosure of the agreement. Only then did the other carriers learn of the reciprocal commitment, the car allowances, the single-minded purpose to divert all traffic possible. It was a permissible inference that the BAR-CP solicitation program, and the correlative violation of § 3(4), was effectively concealed from the connecting carriers through July of 1972 even though bits and pieces of information had come earlier to their attention. The Commission refers to several instances documented in the record where BAR in fact affirmatively misled the inquiring carriers as to the nature of its activity.[17] We think the record sufficiently supports the

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[17] The Commission found that,

> "When in the spring of 1970 . . . [the] president of MEC discovered a sharp decline in freight traffic moving via Northern Maine Junction, he met with top executives of Fraser Paper Limited . . . and Great Northern on June 16 and 22, 1970, respectively, to fight the effects of the BAR-CP solicitation upon the paper freight. . . . Although MEC had been aware of an impending traffic agreement between BAR and CP, both BAR and CP later denied to MEC material information concerning the contents and scope of the July 31, 1970 agreement after repeated requests by MEC."

The Commission went on to refer to MEC's observation of evidence indicating that MEC's president twice in 1970 wrote Mr. Dumaine of BAR and an executive of CP, requesting a copy of the agreement, and being denied that request. Further, the Commission found that early in 1970, the president of BAR wrote the president of MEC:

Commission's ruling that the statute was tolled, allowing recovery, therefore, for the full period of the violation. *See American Pipe and Construction Co.* v. *Utah,* 414 U.S. 538 (1974); *Holmberg* v. *Armbrecht,* 327 U.S. 392 (1946); *Bailey* v. *Glover,* 21 Wall. 342, 348, 88 U.S. 342, 348 (1875); *cf. Arneil* v. *Ramsey,* 550 F.2d 774, 780-82 (2d Cir. 1977) (securities fraud); *Janigan* v. *Taylor,* 344 F.2d 781 (1st Cir.), *cert. denied,* 383 U.S. 879 (1965) (securities fraud).[18]

IV The Cease and Desist Orders

While we uphold the Commission's finding of liability, and of damages, we are troubled by the sweep of the cease and desist orders. The most immediate cause of our concern is the Commission's failure in its report to clarify and define the conduct which the Commission will treat as violative of § 3(4). This inadequacy might be of no moment if the boundaries in this area of regulatory law had been spelled out in other agency decisions or in regulations and rules — or if the cease and desist orders themselves were reasonably detailed. But we deal with a general statute which has received scant judicial or administrative construction in the relevant area and which is otherwise unexplained.

It is true that the definitional failings in the Commis-

"It has never been the policy of this company to solicit routings from the Great Northern Paper Company or other customers, and we have no intention of changing that policy."

[18] While BAR vigorously maintains that its solicitations were legal, it simultaneously urges that MEC and B&M should have known enough to sue at the first inkling that BAR was soliciting on behalf of CP. Now, with voluminous detail before us, it seems apparent that the activities of BAR were well within the prohibition of § 3(4). But it is easily conceivable that the violation would not have been evident to a competing carrier privy only to bits and pieces of information about that activity. Furthermore, while the Commission did not regard the agreement as itself violative of § 3(4), no other piece of evidence revealed so dramatically the scope and purpose of BAR's actions.

sion's report have not deterred us from upholding the Commission's findings against BAR. This is because the BAR-CP arrangement, solemnized in a formal agreement, was a "hard core" violation, clearly foreshadowed by the *Southern Pacific* case and the language of § 3(4) itself. Had there been some question in our mind as to the legality of the conduct and as to the basis for the Commission's findings with respect to BAR, we would have remanded; but we see no likelihood that the infirmities in the report could have prejudiced the outcome. *See Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Bd. of Trade,* 412 U.S. 800, 806-10, 820-22 (1973); *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Ry. Co.,* 294 U.S. 499, 510-11 (1935). However, the cease and desist orders, especially the one applicable to BAR, raise a different problem. BAR is to "cease and desist and thereafter abstain from unlawful preferential solicitation and exercise of its discretion in the distribution of traffic in violation of § 3(4) . . . ."[19] A cease and desist order—through reference to other available sources if not within its own corners—must set forth the perimeters of prohibited conduct with reasonable specificity. *NLRB* v. *Express Publishing Co.,* 312 U.S. 426, 433 (1941); *see* 5 U.S.C. § 557(c); Fed. R. Civ. P.65(d). BAR and CP may be subject to contempt actions or even criminal penalties if found to have violated the orders. 49 U.S.C. §§ 10(1), 16(7), 16(8), 16(12). While they are adequately forewarned against blatant solicitation arrangements of the type in issue, the Commission has done nothing to advise carriers of the other types of conduct which will and will not be deemed violative of § 3(4). Even in our brief exposure in the course of these review proceedings, it has become apparent that outside the area of hard-core

[19] CP is to "cease and desist and thereafter abstain from aiding [BAR] in the violation of Section 3(4) of the Interstate Commerce Act."

conduct, there is a vast unillumined area concerning preferential solicitation and related activity and the application of the statute. For example, the Commission tells us in its report that "preferential solicitation agreements are to some extent commonplace in the railroad industry, and . . . railroads often solicit their best revenue routes and/or their best service routes." It is impossible to know from this what "preferential solicitation agreements," if any, the Commission is prepared to endorse as falling outside the strictures of § 3(4). It is likewise hard to know whether an originating carrier such as BAR could solicit shippers to use a connecting line that formed part of its own best revenue route. Many other questions come to mind: May carriers safely join in solicitation arrangements for the purpose of competing with other modes of transportation? What may an originating carrier safely do when asked for a routing recommendation by a shipper? If an originating carrier can demonstrate that one connecting line is significantly better than another in the service it renders, may it advise its shippers to use that line consistently or must it undertake an individual analysis for each shipper? What non-service considerations, if any, will justify a preferential arrangement?[20]

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[20] Similarly, it is difficult to discern what significance the Commission attaches to the existence or absence of an actual agreement between carriers such as the one here. One of the mystifying parts of the Commission's report is a sentence stating that the BAR-CP pact "itself . . . is not violative of § 3(4)." Probably what is meant is that a mere piece of paper is not a violation of § 3(4) — the agreement must be implemented, with the resultant prejudice in the distribution of traffic. But the Commission did not explain this, encouraging BAR to make the misleading and specious argument before us that the agreement "[w]as expressly held to be lawful." Obviously the Commission meant to hold no such thing: the agreement was highly improper unless we are to assume that BAR had no intention of carrying it out; it constituted significant evidence both of the existence and the deliberate and systematic nature of the violation. The comment nonetheless further blurs the contours of the Commission's holding and adds uncertainty, therefore, to its order.

We would not expect all of these questions to be answered by the Commission, but before approving a cease and desist order we think the Commission should do more to signal its construction of the outer limits of § 3(4). While § 3(4) reflects, in its broadest sense, the policy of Congress, the articulation of rules guiding its specific applications is the province of the Commission. We do not think that carriers should be ordered to cease and desist from conduct much of which they can only guess at. The Commission must "fashion[] orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application," *FTC* v. *Broch & Co.*, 368 U.S. 360, 368 (1962). *See New York, New Haven and Hartford RR Co.* v. *ICC*, 200 U.S. 361, 404 (1906).

We thus vacate the cease and desist orders as presently entered, and remand to the Commission for further proceedings during which it may, at its option, revise the orders so as to reflect greater particularity or follow some other course, such as amending and clarifying its report in this case, or issuing rules and regulations, which would provide BAR and CP with reasonable guidance as to the prohibited conduct. *Cf. Northeast Airlines, Inc.* v. *CAB*, 331 F.2d 579 (1st Cir. 1964). If the latter course is properly followed, the Commission might be justified in issuing new cease and desist orders of comparable brevity to the present ones. *See FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965). Our point is not that the orders themselves need necessarily be detailed, but that there must at least exist a frame of reference so that those to whom they are addressed can know what is expected of them.

The Commission's damage awards are sustained, the cease and desist orders are vacated, and the case is remanded to the Commission for further proceedings consistent herewith.

No costs.

CERTIFIED COPY

United States Court of Appeals
For the First Circuit

No. 77-1082.
BANGOR AND AROOSTOOK RAILROAD COMPANY,
PETITIONER,
v.
INTERSTATE COMMERCE COMMISSION,
RESPONDENT,

MAINE CENTRAL RAILROAD ET AL.,
INTERVENORS.

No. 77-1105.
MAINE CENTRAL RAILROAD COMPANY,
PETITIONER,
v.
UNITED STATES OF AMERICA, AND
INTERSTATE COMMERCE COMMISSION,
RESPONDENTS,

BANGOR AND AROOSTOOK RAILROAD COMPANY,
INTERVENOR.

No. 77-1108.
ROBERT W. MESERVE AND BENJAMIN H. LACY,
TRUSTEES OF THE PROPERTY OF BOSTON AND
MAINE CORPORATION, DEBTOR,
PETITIONERS,
v.
UNITED STATES OF AMERICA, AND
INTERSTATE COMMERCE COMMISSION,
RESPONDENTS.

DECREE
Entered March 30, 1978

This cause came on to be heard upon petitions for review of an order of the Interstate Commerce Commission, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The Commission's damage awards are sustained, the cease and desist orders are vacated, and the case is remanded to the Commission for further proceedings consistent with the opinion filed today.

No costs.

By the Court:
(s) DANA H. GALLUP, *Clerk.*

A True Copy
ATTEST:
(s) DANA H. GALLUP, *Clerk.*

[Cert. cc: ICC and Messrs. Fordham, Nickles, Gulland, Weinberg, Monroe and White.]

United States Court of Appeals
For the First Circuit

No. 77-1082
BANGOR AND AROOSTOOK RAILROAD COMPANY,
PETITIONER,
v.
INTERSTATE COMMERCE COMMISSION,
RESPONDENT,

MAINE CENTRAL RAILROAD COMPANY, ET AL.,
INTERVENORS.

MEMORANDUM AND ORDER
ON PETITION FOR REHEARING
Entered: May 12, 1978

Before
CAMPBELL, *Circuit Judge*,
TUTTLE, *Circuit Judge*,*
WOLLENBERG, *District Judge*.**

Bangor and Aroostook Railroad Company ("BAR") has petitioned for rehearing and/or, rehearing en banc, on the question whether the statute of limitations bars recovery of damages incurred by Maine Central Railroad ("MEC") and by the trustees of Boston and Maine Corp. ("B&M") prior to July 8, 1972. The statute of limitations question was addressed and decided against BAR in our opinion. BAR now claims an inconsistency between our treatment of the issue there and in this court's recent opinion in *Cook* v. *Avien*, Nos. 77-1106 and 77-1107, issued March 28, 1978.

* Of the Fifth Circuit, sitting by designation.
** Of the Northern District of California, sitting by designation.

In *Cook* the purchasers of stock sued a broker and the issuing company for fraudulent omissions during the course of the sale. We held that plaintiffs had failed to carry their burden of proving reasonable diligence in investigating and pursuing their claims once they were on notice that their investments were rapidly deteriorating. We held them barred by the one-year statute from recovery under §§ 12(1) and (2) of the Securities Act of 1933. We remanded on the question of whether the applicable two-year limitations period similarly prevented recovery under § 10(b) of the Securities Exchange Act as this necessitated a more precise factual inquiry than was appropriate at the appellate level.

In seeking rehearing in the case at bar, BAR maintains that there was

> "uncontradicted proof that at least as of September 18, 1970 complainants had actual knowledge of (1) their 'sudden adversity' through a 'decline in traffic shipped over their lines' (Opinion at 37); (2) 'the intensified sales effort' by CP and BAR (Opinion at 8 and 37);[1] (3) the existence of an agreement between BAR and CP that called for some form of additional payments by CP to BAR for additional BAR connecting traffic moving via BAR (Ex. 67-68, 73); and (4) the purpose of the BAR-CP activities 'to foster elimination of Maine Central from all possible routings' (Ex. 73)—knew, in fact, of all the material elements of the violation of section 3(4) that the Commission and this Court have found in this case."

BAR argues that our holding that the statute was tolled in these circumstances conflicts with the ruling in *Cook* that the statute was not tolled "when 'storm warnings' had

[1] We actually said, Opinion at 8, that "MEC became generally aware of the intensified promotion campaign on CP's behalf," and, at 37, that "the carriers' investigation uncovered the intensified sales effort by CP, and, possibly, by BAR."

given the potential plaintiffs 'inquiry' notice . . . that they must diligently investigate what lay behind the warnings.

While the argument is by no means frivolous we think the different rulings in the two cases were justified by different factual and legal considerations. We start by pointing out that the evidence, in its totality, is not so conclusive of MEC's "actual knowledge" as BAR would have it. The evidence is equally indicative of MEC's holding mere suspicions about BAR-CP activity, fired by rumor and BAR's waffling in the face of pointed interrogation by MEC—suspicions held despite BAR and CP's concurrent obfuscation of their plan.

For example, MEC President Miller's memorandum of a conversation he had with Dumaine on July 2, 1970, shows that Dumaine described BAR's "reported arrangement" with CP variously as a result of shipper preference and concomitant BAR revenue interests, a need for better service on its connecting lines, and alleged difficult working relations between BAR and MEC personnel. Dumaine also said the alleged contract had not yet been finalized, that it was still being worked on, that he had never seen a final draft. Dumaine "further indicated, in view of what [Miller] said, that there was some doubt if the Montreal agreement would ever be finalized." Dumaine did disclose to Miller, when pushed, the general terms of at least one version of the proposed arrangement. (He expressed the financial agreement between BAR and CP in different ways at different points in the conversation.) But Dumaine did not respond to Miller's request to see the agreement, and put Miller off generally with regard to the agreement's status and future, *i.e.*, whether it would be put into effect. Yet by this time, July 2, an agreement in principle had been reached, and the solicitation efforts of both BAR and CP had begun.

This evasive approach typified BAR's response to MEC's other inquiries. As we noted in the opinion, early in 1970 the president of BAR wrote the president of MEC that

> "[i]t has never been the policy of this company to solicit routings from the Great Northern Paper Company or other customers, and we have no intention of changing that policy."

This was written when negotiations between BAR and CP were already in progress.

Requests by MEC that BAR or CP disclose the arrangement went unheeded by BAR. Though there was testimony that in June, 1970, before Miller's interview with Dumaine, BAR apprised MEC of the existence of an arrangement yet to be executed, subsequent inquiry of CP officials elicited the responses that CP "was performing a sales blitz in Aroostook County, which is necessary"—implicitly on its own initiative, and that "there was no division agreement in the works," but "probably there would be a per diem agreement." Miller's statement, in his letter of September, 1970, to Great Northern, evinces MEC's awareness that "it is no secret that Mr. Dumaine entered into a little hanky-panky with the Canadian Pacific whereby [BAR] and [CP] agreed to use their best efforts to foster elimination of [MEC] from all possible routings," but at the same time it sets forth again, albeit skeptically, BAR's disingenuous responses that car supply and service considerations motivated and warranted the arrangements. Further, in March, 1972, a BAR vice-president wrote to the B&M Chief Executive Officer that the "overriding factors which contribute towards the decision to use CPR are service and car supply," and requested that the B&M official not divulge the Brownville Junction traffic data to MEC. The BAR officer later conceded that he did not mention the contract when discussing changing traffic patterns in the letter to

B&M because of BAR "sensitivity" about the agreement with CP.[2]

Evasive and misleading responses of this sort by the defendants were not a factor in *Cook*. The *Cook* investors made feeble inquiry of those who had defrauded them on a single occasion over six months after serious financial reverses were manifest. It was not contended that they were then misled or lulled. In the case at bar, MEC made diligent inquiry. Although it unearthed some knowledge, it could be found to have been impeded by BAR's evasions from arriving at a full appreciation of the true scope and character of BAR's plan until disclosure of the agreement in 1972.[3] We do not sympathize with BAR when it argues that MEC should be charged with knowledge notwithstanding BAR's deliberate concealment.

Other factors also differentiate this case from *Cook*. First, the cause of action under § 3(4) was little known and infrequently used by carriers against each other, and its contours were ill-defined, making it less reasonable to expect MEC and B&M to have ascertained from the incomplete evidence available in 1970 that they had a cause of action under § 3(4). In *Cook*, by contrast, the Securities Act and Securities Exchange Act provided well defined

[2] MEC points out additionally that BAR failed to report its agreement with CP in its annual report to the Commission in 1970. The report form, at section 531, requires:

> "a concise statement of each important contract, agreement, arrangement, etc., with other companies or persons, . . . which became effective during the year, and concerned in any way the transportation of persons or things at other than tariff rates . . . includ[ing] joint facility arrangements."

This agreement, which projected diversion of 24,000 carloads over the course of the year, falls easily within the category of contracts to be disclosed.

[3] For example, disclosure of the agreement informed MEC of the ostensibly 15 year long commitment, the 24,000 car per year diversion target, the rebate mechanism, and the absence of service factors or contingencies, which all bore on the lawfulness of BAR's plan.

vehicles for relief from alleged securities fraud. Second, and related to the foregoing, the scope and firmness of the BAR-CP commitment, and its underlying reasons, were tied into the availability of § 3(4) relief. Given the relative complexity of a § 3(4) action, it was not enough for MEC simply to suspect some degree of "hanky-panky" and collusion. As we pointed out in the opinion at n.18,

> "While BAR vigorously maintains that its solicitations were legal, it simultaneously urges that MEC and B&M should have known enough to sue at the first inkling that BAR was soliciting on behalf of CP. Now, with voluminous detail before us, it seems apparent that the activities of BAR were well within the prohibition of § 3(4). But it is easily conceivable that the violation would not have been evident to a competing carrier privy only to bits and pieces of information about that activity. Furthermore, while the Commission did not regard the agreement as itself violative of § 3(4), no other piece of evidence revealed so dramatically the scope and purpose of BAR's actions."

Third, the policies at work in applying the securities acts are distinct from those to be considered in implementing the Interstate Commerce Act. The large number of investors, the scope of § 10(b) protection and its broad potential for violation, and the rapid changes in market conditions that create the desire for a hedge, all enhance the need for firm enforcement of the statute of limitations in cases such as *Cook*. We pointed this out in *Cook*, slip op. at 9 (diligence required so that the securities acts not "be used as havens for speculation and a buffer against any investment loss.") In this transportation case, by contrast, longer-lasting institutional arrangements which may be slow to reveal themselves provide the focus; the parties are interdependent institutions for whom to incur the antagonism of shippers and sister carriers by bringing

suit before all the facts are known is a risk-laden venture; and the ICC investigation here embodied the evolution of a broad-based policy consistent with the language and spirit of § 3(4), but not, without the entire picture, an obvious statutory violation. (BAR notes MEC's early awareness of the agreement's possible illegality only in an anti-trust context.) We are here, moreover, reviewing a decision by an administrative agency concerning a statute entrusted to its authority. The equities involved in the tolling of the period of limitations are entwined with the policy considerations of the Interstate Commerce Act. Considerable deference is owed to the agency's perception of the equities in such a case.

We conclude therefore that the decision in this case constitutes a fair application of the doctrine of equitable tolling as developed in the cases, including *Cook* v. *Avien*.

The petition for rehearing is denied.

United States Court of Appeals
For the First Circuit

No. 77-1082.

BANGOR AND AROOSTOOK RAILROAD COMPANY,

PETITIONER,

v.

INTERSTATE COMMERCE COMMISSION,

RESPONDENT,

MAINE CENTRAL RAILROAD ET AL.,

INTERVENORS.

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

ORDER OF COURT

Entered May 12, 1978

It is ordered that the petition for rehearing En Bank is hereby denied.

By the Court:

(s) DANA H. GALLUP, *Clerk*.

[cc: Messrs. Fordham, Lawson, Ripple, Weinberg, Culland and Monroe.]

JUN 1 1978
[SERVICE DATE]

EC

INTERSTATE COMMERCE COMMISSION

DECISION

NO. 35940

IN THE MATTER OF INVESTIGATION INTO LAWFULNESS OF INTERCHANGE ARRANGEMENTS BETWEEN THE BANGOR AND AROOSTOOK RAILROAD AND CP RAIL AT BROWNVILLE JUNCTION, MAINE

NO. 35987

MAINE CENTRAL RAILROAD COMPANY

v.

BANGOR AND AROOSTOOK RAILROAD COMPANY

NO. 36013 (Sub-No. 1)

BOSTON AND MAINE CORPORATION,
ROBERT W. MESERVE AND BENJAMIN H. LACY, TRUSTEES

v.

BANGOR AND AROOSTOOK RAILROAD COMPANY

The United States Court of Appeals for the First Circuit in *Bangor and Aroostook Railroad Company* v. *Interstate Commerce Commission*, Nos. 77-1082, *et al.* (1978), remanded these proceedings to the Commission for the limited purpose of clarifying the scope of conduct prohibited under Section 3(4) of the Interstate Commerce Act contemplated by the cease and desist orders entered in these proceedings.

In accordance with the Court's judgment, these proceedings will be reopened for this limited purpose. We believe it is appropriate to give the parties an opportunity to present their views on this issue.

It is ordered:

1. These proceedings are reopened.

2. The parties may submit within 30 days from the date this order is served statements setting forth their views as to the scope of conduct which they believe should be deemed to be prohibited by section 3(4) of the Act.
3. The parties may also direct their comments to what they believe to be the best method of complying with the Court's limited order of remand to clarify this issue, e.g., by revising the present cease and desist orders, amending the report, issuing a further report and new orders, or through some other method.

Decided May 25, 1978.

By the Commission, Chairman O'Neal, Vice Chairman Christian, Commissioners Murphy, Brown, Stafford, Greshman, and Clapp.

H. G. HOMME, JR.
Acting Secretary

(SEAL)

INTERSTATE COMMERCE COMMISSION

No. 35940[1]

IN THE MATTER OF INVESTIGATION INTO LAWFULNESS OF INTERCHANGE ARRANGEMENTS BETWEEN THE BANGOR AND AROOSTOOK RAILROAD AND CP RAIL AT BROWNVILLE JUNCTION, MAINE

Decided February 4, 1977

Found that Bangor and Aroostook Railroad Company, aided by CP Rail, Canadian Pacific Limited, unduly prejudiced Maine Central Railroad Company and Boston and Maine Corporation, Robert W. Meserve and Benjamin H. Lacy, Trustees, in the distribution of traffic in violation of section 3(4) of the Interstate Commerce Act, and that in consequence of such violation Maine Central Railroad Company and Boston and Maine Corporation, Robert W. Meserve and Benjamin H. Lacy, Trustees were injured during the 5-year period 1970 - 1974. Damages awarded.

William M. Houston, Richard J. Flynn, John S. Edwards, Lee A. Monroe and *Edward T. Robinson* for respondents in No. 35940.

Daniel S. Linhardt, Daniel M. O'Donoghue and *Bernard A. Gould* for Bureau of Enforcement, Interstate Commerce Commission in No. 35940.

Peter J. Nickles, Eugene D. Gulland and *Sidney Weinberg* for protestants in No. 35940.

Howard C. Westwood, Peter J. Nickles, Eugene D. Gulland and *Scott W. Scully* for complainant in No. 35987.

Sidney Weinberg for complainant in No. 36013 (Sub-No. 1).

William M. Houston and *Edward T. Robinson* for defendant in No. 35987 and No. 36013 (Sub-No. 1).

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[1] Embraces also No. 35987, Maine Central Railroad Company v. Bangor and Aroostook Railroad Company and No. 36013 (Sub-No. 1), Boston and Maine Corporation, Robert W. Meserve and Benjamin H. Lacy, Trustees v. Bangor and Aroostook Railroad Company.

REPORT AND ORDER OF THE COMMISSION

By the Commission:

Exceptions to the initial decision of the Administrative Law Judge were filed by respondent-defendant Bangor and Aroostook Railroad Company (BAR), and respondent Canadian Pacific Limited (CP). Complainant Maine Central Railroad Company (MEC), complainant Boston and Maine Corporation, Robert W. Meserve and Benjamin H. Lacy, Trustees (B&M), and the Bureau of Enforcement, Interstate Commerce Commission, separately filed replies thereto. Our conclusions differ in part from those of the Administrative Law Judge. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified or their resolution unnecessary for the proper disposition of the proceeding.

The three proceedings embraced herein were initiated as follows: By its own motion on December 5, 1973, the Commission, Division 2, instituted an investigation into and concerning the lawfulness of interchange arrangements and certain practices by respondents BAR and CP; by complaint filed March 13, 1974 (No. 35987), MEC alleges that it has been unduly prejudiced in the distribution of traffic during the 5-year period 1970-1974 by its connecting line carrier BAR in violation of section 3(4) of the Interstate Commerce Act; by Complaint filed July 8, 1974 (No. 36013 (Sub-No. 1)), B&M alleges that it has been unduly prejudiced in the distribution of traffic during the 5-year period 1970-1974 by BAR in violation of section 3(4) of the act. B&M and MEC are connecting lines.

The proceedings were heard before the Administrative Law Judge on a consolidated record. The Administrative Law Judge, in his initial decision, found that BAR, aided and abetted by CP, unduly prejudiced MEC and B&M in the distribution of traffic in violation of section 3(4) of the

act, and awarded MEC and B&M damages in the amount of $1,590,438 and $688,330 respectively, with simple interest of 4 percent. The Administrative Law Judge ordered BAR to cease and desist from violating section 3(4) of the Act, and further ordered CP to cease and desist from aiding BAR in the violation of section 3(4) of the Act.

Respondent-defendant BAR enumerates in its exceptions over 30 errors allegedly committed by the Administrative Law Judge, and respondent CP reiterates many of the same exceptions stated by BAR. Together the exceptions are basically cumulative and recite the position of the parties as presented in their initial briefs and supporting documents. Thus, the length and repetitive nature of these exceptions necessitates disposition without specific reference or detailed discussions thereof.

Consolidating BAR's and CP's specific allegations of error to the Administrative Law Judge's initial decision, the exceptions, as regrouped and restated, allege the following:

(1) The Administrative Law Judge erred, as a matter of law, in finding that the preferential solicitation practices of BAR, aided by CP, were a violation of section 3(4) of the Act.

(2) The Administrative Law Judge erred in finding that BAR, aided by CP, unduly prejudiced MEC and B&M in the distribution of traffic in violation of section 3(4) of the Act.

(3) The Administrative Law Judge erred in failing to find that all of the traffic in question was specfically routed by the shipper and diverted for service reasons.

(4) The Administrative Law Judge erred in failing to find or make findings contrary to the following statements:

(a) a common interchange is essential to finding a section 3(4) violation,

(b) BAR cannot violate section 3(4) with respect to inbound traffic because it is not in a position to distribute it,

(c) several of the BAR-CP routes were superior to the competing MEC-B&M routes, and

(d) the BAR-CP Agreement promoted rail competition and improved rail service.

(5) The Administrative Law Judge erred in finding that the two-year limitation statute in section 16(3)(b) of the act is not applicable to MEC's and B&M's damage claims.

(6) The Administrative Law Judge erred in awarding damages to MEC and B&M since they did not prove their damages with the exactitude and certainty required in a court of law.

In reply, complainants specifically dispute BAR's and CP's exceptions and encourage adoption of the initial decision. The Bureau of Enforcement also disputes BAR's and CP's exceptions with respect to the denial of any violation under section 3(4) of the act.

The evidence, the Administrative Law Judge's initial decision, the exceptions and the replies have been considered. We find the Administrative Law Judge's statement of facts to be correct in most material respects, and, except where inconsistent herewith, we adopt it as our own. The facts will be restated, however, insofar as necessary for a proper understanding and resolution of the issues raised on exceptions. Additionally, we hereby take official notice of the Quarterly Commodity Statistics reports submitted annually to the Commission by the parties to this proceeding from the years 1962 to 1975.

PRELIMINARY MATTERS

Several preliminary matters must be initially discussed. Respondent-defendant BAR filed on October 26, 1976, two separate motions to strike portions of MEC's, B&M's, and the Bureau of Enforcement's replies to exceptions. By statement filed the same day, respondent CP joined in the motions to strike filed by BAR. Replies were filed on November 22 and 26, 1976, by complainants MEC and B&M, respectively. The Bureau of Enforcement filed on November 12, 1976, a motion to strike one of BAR's motions on the grounds that BAR failed simultaneously to serve on all parties their motion which was filed with the Commission on October 26, 1976, and that the motion is a reply to a reply. BAR replied to the Bureau of Enforcement's motion to strike on November 26, 1976. Each of the preceding motions will be discussed in turn.

Rule 23(a) of the Commission's General Rules of Practice (49 CFR §1100.23) does not permit the filing of a reply to a reply. BAR's motion entitled "motion to strike portions of opposing briefs as false, misleading, or otherwise improper" has no basis in fact for its allegations, and is essentially a reply to statements in MEC's and B&M's replies to exceptions. This motion, therefore, is hereby denied under rule 23(a).

The second motion of BAR, entitled "motion to strike portions of the briefs of the Maine Central Railroad Company and of the Bureau of Enforcement as asserting exceptions in an untimely fashion, or alternatively to direct the filing of a reply brief", raises three instances where BAR asserts that arguments contained in MEC's and the Bureau of Enforcement's replies to exceptions are in fact exceptions, and should therefore be stricken as untimely filed. We do not procedurally reject this motion to strike, but find on the merits that the MEC arguments noted by BAR are not disguised exceptions but rather valid argument in

support of the Administrative Law Judge's initial decision. The motion to strike MEC's statements therefore, is hereby denied, and the filing of BAR's reply brief to these statements is rejected as a reply to a reply under rule 23(a).

We hereby grant, however, that part of BAR's motion to strike the Bureau of Enforcement's argument with respect to an alleged violation of section 15(11) of the Act. Although we make no determination as to the validity of a section 15(11) violation, the Bureau's conclusory statement is improperly raised in its reply to exceptions, since the alleged violation was neither made an ancillary subject of the Bureau's investigation nor discussed in its pre-hearing and post-hearing briefs.

Finally, respondent-defendant BAR requests oral argument on its exceptions. Inasmuch as the position of all the parties have been clearly set forth in their briefs and again in their exceptions, we believe that the issues and arguments in this proceeding are adequately presented on the record as made. We hereby deny, therefore, the request for oral argument.

THE FACTS

Respondent-defendant BAR operates a 541-mile network of track in northeast Maine, and is predominantly an originating carrier. Its two major interchange points for inbound and outbound traffic are at Brownville Junction with respondent CP only and at Northern Maine Junction with complainant MEC only. Outbound carloads delivered to MEC for through hauls are further interchanged with the B&M, Canadian National Railway, or CP. Brownville Junction is 45.3 miles north of Northern Maine Junction. (See Map, Appendix A).

On October 2, 1969, BAR was acquired by Amoskeag Company after its purchase of 99 percent of BAR capital stock. Amoskeag Company is controlled by a voluntary

association called Dumaines, which in turn is controlled by Frederic C. Dumaine. Following the acquisition of BAR, Mr. Dumaine became a director and chief executive officer of BAR. At the time of the acquisition Amoskeag Company also owned 26 percent of MEC, and word of an impending merger of MEC and BAR became widespread.

In the period early to mid-November 1969, William J. Strout, who had remained as president of BAR at the request of Mr. Dumaine, requested Hugh G. Goodness, general freight manager of BAR, to prepare a traffic study which showed which of the cars interchanged with MEC at the Northern Maine Junction could be diverted to CP at the Brownville Junction. Prior to receiving the study Mr. Strout received a telephone call from Jerry D. Perkins, Director of Transportation of Great Northern Paper Company (Great Northern), a major shipper on BAR's lines. Mr. Perkins was concerned with Great Northern's prospective car supply in the event of a BAR-MEC merger and asked Mr. Strout whether BAR would be disturbed if Great Northern routed more traffic via CP. Mr. Strout informed Great Northern that BAR "would not be."

On November 26, 1969, Mr. Goodness submitted a memorandum to Mr. Strout which showed that there "are rates, routes, and divisions published today which would allow diversion" of 18,325 and 5,381 cars on outbound and inbound traffic, respectively, from Northern Maine junction to Brownville junction. Mr. Goodness also stated that "except on paper and potatoes BAR divisions are exactly the same . . ., and on paper and potatoes there are instances where [BAR's] divisions are better via [Brownville Junction, thus offsetting] any revenue losses incurred in the diversion of traffic [from Northern Maine Junction.]." BAR subsequently discovered, however, that its divisions on paper and potatoes were generally higher when the traffic moved via MEC at Northern Maine Junction. Mr.

Strout sent the traffic study to Mr. Dumaine on the same day it was received, noting on the letter of transmittal that it was "interesting to note that Jerry Perkins . . . called me on Monday of this week and stated that he wanted to sit down with our people and see how much of their traffic could be routed CP . . .".

Mr. Goodness supplemented his study of traffic susceptible to diversion with two memoranda dated December 4 and 6, 1969, which showed (1) the traffic by commodities which would continue to move via MEC, and (2) estimated revenue losses of about $2.8 million annually that would be incurred by each MEC and B&M if all the outbound and inbound traffic of approximately 24,000 cars was successfully diverted. On December 8, 1969, Mr. Strout sent Mr. Dumaine a memorandum entitled "Meeting with CP re Routing of Traffic" which detailed the 24,000 cars available for diversion and indicated that MEC and B&M would each lose $2.75 million from the diversion. Mr. Strout further noted in his memorandum that "we must be sure we are going to make this move because, we will get serious objections from the Maine Central . . .".

Additionally, on December 18, 1969, Mr. Goodness delivered a report to Mr. Strout comparing transit times of movements via Brownville Junction and Northern Maine Junction to 103 destinations during BAR's fiscal year 1969, which included the winter of 1968-69. This report showed there was no difference to 54 points, that transit time via Brownville Junction was better to 26 points, and that transit time via Northern Maine was better to 23 points. This report was never shown to any shipper.

On December 19, 1969, a meeting was held in Montreal, Quebec, Canada, between top officials of BAR and CP. At this meeting, where a variety of matters were discussed, BAR raised the prospect that CP's share of the freight originated and terminated on the lines of BAR could be

increased by 24,000 cars. CP noted its interest in building up traffic through the Brownville Junction interchange, and felt that BAR's cooperation in the movement of traffic through Brownville Junction was important to CP's effort.

At a meeting in Montreal on January 9, 1970, attended by Mr. Strout, Mr. Goodness, and Mr. Swales for BAR and William G. Scott, Assistant General Manager, Pricing, and Mr. Burbidge for CP, BAR indicated its intention "to route CP rail via Brownville Junction the following new traffic now moving via other routes." The referenced traffic was the same 23,706 cars set forth in the memorandum Mr. Goodness had sent to Mr. Strout on November 26, 1969. BAR also made clear to CP that CP would not have to provide additional cars to secure this new traffic, that BAR would soon supply CP with origin and destination statistics of all traffic susceptible to diversion, and that all CP had to do to get it would be to go out and solicit.

On January 13, 1970, CP's Vice-president Senior Executive Officer Stephenson M. Gossage, wrote to Mr. Strout that CP was prepared to solicit the new traffic and would agree to make the necessary physical changes at Brownville Junction to facilitate the movement of the 24,000 cars which would be diverted from Northern Maine Junction. Mr. Gossage also wrote that CP understood the diversion to "be long-term and not subject to any reversal of policy on the part of [BAR]." Confirmation of this understanding was requested.

Sometime after January 13, 1970, Mr. Strout told Mr. Goodness to determine the BAR divisions via the CP Brownville Junction route in order to discover which divisions of the diverted traffic might be lower for BAR via CP than via MEC. Prior to receiving this report, Mr. Strout sent a letter to Mr. Gossage on January 20, 1970, and "agreed completely" with Mr. Gossage's understanding of the agreement and added that if it appeared BAR would

suffer and "serious loss" in divisions because of the diversion, an arrangement should be "ironed out prior to any long term traffic routing." On January 22 and 26, 1970, Mr. Goodness of BAR gave to Mr. Strout a memorandum and supplement, respectively, which for the first time showed the difference in BAR divisions between the MEC and CP routings on paper and potato traffic.

On or about February 2, 1970, BAR sent CP an IBM printout showing the origins, destinations, commodities, revenue, and number of cars for the traffic to be diverted. This printout was to be the basis of CP's solicitation efforts. The consignors and consignees of most commodities could be determined from the printout. At no time in the past had this printout been made accessible to any other carrier.

The question of divisions was first discussed at a meeting on February 4, 1970, by BAR and CP officials. Mr. Goodness expressed an opinion that BAR and MEC would merge within two years, and that this could result in more traffic for CP. CP, however, feared that such a merger would result in its exclusion from New England traffic, and thus CP requested a long-term traffic arrangement to protect its traffic interests in the event of a consolidation of BAR and MEC.

Following this meeting, at which BAR had indicated it was prepared to sign a 10-year agreement, CP decided it would not support a change in divisions but would offer BAR a car allowance on each carload of paper in excess of the number of cars which moved via Brownville Junction in the BAR fiscal year 1969. Documentary evidence and transcript testimony indicate that CP's purpose behind the use of the car allowance was to encourage BAR to use its influence to secure as much freight as possible for the CP route.

At another meeting on March 2, 1970, Mr. Goodness of BAR informed Mr. Scott of CP "that the BAR had not yet routed as much traffic via CP Rail as it can . . . ." This statement confirmed Mr. Gossage's views that BAR could in fact be of assistance in delivering traffic to CP. Mr. Goodness also told Mr. Scott not to use the printout material he had given CP until an agreement had been worked out. Sometime thereafter CP held a series of sales meetings in several regions for the purpose of planning for the campaign to divert traffic pursuant to the arrangement under negotiation with BAR. On March 18, 1970, a CP solicitor "jumped the gun" and persuaded a consignee (shipper) to divert its freight to the CP route.

After several discussions between BAR and CP officials with respect to the amount of the car allowances agreement was reached in early June, 1970. The amount of car allowance payments on new traffic through Brownville Junction was ostensibly the product of a compromise between CP and BAR in the latter's effort to equalize divisions on traffic moving via Northern Maine Junction and Brownville Junction, although the car allowances on all new traffic above the specified amount for paper and potato traffic would result in revenues greater than BAR would have received if divisions had been equalized.

The terms of the agreement were finalized on June 3, 1970, and soon afterwards Mr. Strout of BAR indicated in a memorandum to his files that "CP is turning loose their sales people immediately and so are we." Mr. Strout promptly sent orders to key BAR personnel which stated "that all sales people are to be notified immediately and all station agents as soon as possible . . . that we should start soliciting at once all traffic possible through Brownville Junction, particularly with respect to paper and potatoes." No mention was made regarding service considerations or what information should be made available to

the shipper. Moreover, BAR had never previously solicited a particular route for its shippers.

On June 4, 1970, Joseph C. Hickson, Assistant Vice-president of marketing of BAR, held a joint meeting with CP personnel to plan for joint solicitation efforts. Mr. Hickson and CP personnel met again on June 20, 1970, for the purpose of reviewing solicitation efforts with respect to the movement of starch shipments which were not moving via CP routes. In a memorandum to Howard L. Cousins, Vice-president of marketing of BAR, Mr. Hickson referred to his meeting with CP, and stated that the starch shipments "will be covered at both ends by the CP and ourselves."

BAR's top marketing officials, their subordinates, and all BAR station agents thereafter commenced solicitation efforts aimed at all BAR shippers to route via Brownville Junction. During June, August and December of 1970, BAR prepared and distributed suggested routes to the principal shippers on its lines for the movement of their freight. All suggested routes were via Brownville Junction, with many instances of several CP routes to the same destination. This was the first time BAR furnished shippers with routing guides. Among the reasons given by Bar to its shippers for urging CP routings were service, fast return of empty cars, transit difficulties on the American rail lines the previous year, and that an increase in traffic via Brownville Junction would improve CP service.

CP's on-line and off-line sales force, armed with information supplied from the BAR computer printouts, also began soliciting BAR originations and terminations for CP routings. In certain instances BAR and CP personnel made joint visits to shippers on BAR lines urging CP routings.

On July 31, 1970, the agreement (See Appendix B) between BAR and CP was finally executed, effective Janu-

ary 1, 1970, and was to continue in force for a term of 15 years with the provision that it may be reopened by either party at the end of 5 and 10 years from the effective date.

By its terms BAR agreed "to interline with CP Rail via Brownville Junction as many cars of paper products and potatoes as it is possible for it to so interline and anticipates that by reason of this agreement such interline traffic will be increased by approximately 24,000 cars annually . . .". As in Mr. Goodness's study of November 26, 1969, except that the numbers were approximated, the breakdown of the cars susceptible to diversion were as follows: outbound — 11,000 paper products, 4,500 potatoes, and 3,500 other; inbound — 5,000 miscellaneous. CP was to pay a specific allowance for each car of paper products and potatoes over the number of cars of paper products and potatoes which moved via Brownville Junction in BAR fiscal year 1969. BAR's understanding of this agreement was that it required its continuous solicitation of routings via the Brownville Junction.

The solicitation efforts of BAR and CP met with some instant success prior to the finalization of the agreement. When in the spring of 1970, E. Spencer Miller, president of MEC, discovered a sharp decline in freight traffic moving via Northern Maine Junction, he met with top executives of Fraser Paper Limited (Fraser) and Great Northern on June 16 and 22, 1970, respectively, to fight the effects of the BAR-CP solicitation upon the paper freight which had been moving via Northern Maine Junction. Although MEC had been aware of an impending traffic agreement between BAR and CP, both BAR and CP later denied to MEC material information concerning the contents and scope of the July 31, 1970 agreement after repeated requests by MEC.

In addition to Mr. Miller's personal contact with shippers on the BAR lines, he also instructed MEC's Vice-

president of traffic to institute a counter-solicitation effort in BAR territory. As a result of MEC's partial success in stemming the amount of traffic diverted from Northern Maine Junction, Mr. Strout of BAR complained on July 14, 1970 to Mr. Gossage of CP that CP solicitors were not vigorous enough in getting traffic diverted to CP routings, and on July 31, 1970, Mr. Strout called on Mr. Gossage for additional BAR-CP joint solicitation in BAR territory. Documentary evidence in the period March 1970 to January 1975 shows a marked success in the BAR-CP solicitation efforts, despite counter solicitation efforts by MEC.

The aspect of car supply also played a role in BAR's efforts to encourage shippers to route via Brownville Junction. In early October, 1969, Great Northern became concerned lest the merger of BAR and MEC reduce the supply of boxcars available to them. Great Northern's director of transportation sought the advice of BAR "to [obtain] cars and come up with a figure as to the number of cars per day that they would like for the Canadian Pacific to furnish." Great Northern set the 100-car per month figure after receiving BAR's per day car figure. On October 28, 1969, Mr. Strout reported to BAR's board of directors that 100 new 50 foot paper cars were being purchased for delivery in January or February 1970, and that BAR's car fleet was reasonably adequate.

Great Northern subsequently arranged a meeting with BAR and CP personnel for December 16, 1969. At this meeting CP agreed to increase its car supply in exchange for an additional 100 cars of freight routed CP each month. CP understood that Great Northern wanted to protect its car supply in the event of a BAR-MEC merger and to reduce dependency upon routing of B&M and MEC for the flow of empty cars.

On January 9, 1970, however, CP was told by Mr. Goodness of BAR, who had sat in at the meeting in which the

Great Northern-CP agreement was made, that it would not be expected to supply additional equipment because BAR had 2,500 reefer cars for frozen food and potato traffic and is receiving delivery now of 100 new 50-foot paper cars. CP was thus not required to furnish the 100 cars a month under its agreement with Great Northern because BAR was able to meet all the needs of its consignors. Great Northern's routings, therefore, were unknowingly influenced by BAR's manipulation of its car supply.

BAR's preferential solicitation in 1970 led both Great Northern and Fraser to believe that a power struggle existed between BAR and MEC "whereby BAR hopes to weaken MEC financially and make a take-over easier," and that BAR had the "power to force a diversion via Brownville Jct. to some extent," e.g. "to refuse to accept cars of B&M and Canadian National ownership" for Great Northern's use. In July, 1970, Fraser learned that the MEC route was 2 days faster than the CP route, and informed BAR that it was returning to the MEC route. On July 21, 1970, BAR canceled its order for Canadian National cars so as to place more CP cars at Fraser. The use of CP cars, rather than Canadian National cars, would thereby insure routing by Brownville Junction. This cancellation lasted 3 to 4 months. Mr. Strout concedes that no car supply problem existed at the time, nor did a major car supply problem arise at any time during the 1970-1974 period. In fact, BAR declined MEC's offer of additional cars in September and October of 1970.

Prior to the 1970-1974 period, BAR and CP had been the prime suppliers of empty cars for loading the paper traffic. Great Northern attributed its good fortune of not experiencing a lack of boxcar equipment to CP's alleged supplementation of the BAR car supply. CP had turned over to BAR 1517, 1959, 2931, 1393, 854, 1140, and 1292 cars for paper loadings in 1968 through 1974, respectively.

With the exception of 1970, however, the annual CP supply in the 1970-1974 period was lower than in 1968 and 1969. In 1972 the CP supply was less than half the supply in 1969. At no time did either paper company experience any appreciable car shortage.

Further evidence in the record shows the influence of BAR-CP solicitations on both shippers and shipper's customers. On September 10, 1970, a frozen food shipper sought advice from BAR regarding five routes from Easton to Robbinsville, N.J. Three of the routes were via Brownville Junction and the other two via Northern Maine Junction. This shipper was informed that from a transit time standpoint BAR's first choice was a route via Brownville Junction followed by a route via Northern Maine Junction. However, it appears this advice was offered without actual knowledge of the transit time over the route via Brownville Junction. Moreover, as late as August 11, 1970, BAR had sought from CP the transit times via CP routes which BAR had already been suggesting to shippers. CP, however, had no reliable figures with respect to transit time to any of the destinations in question.

On March 8, 1971, BAR wrote CP that a BAR frozen food shipper had called about the CP route. A consignee was questioning the shipper on the use of CP on all the traffic. The shipper was advised that the CP route was recommended because of service and the return of empties. At that time, however, CP was having a "hard time" because of snow problems. Yet the shipper was induced to ship four cars via CP that day. On May 5, 1971, BAR informed CP that an analysis of its transit records on certain traffic to various destinations via Brownville Junction and Northern Maine Junction showed that the latter was better than the former and that this could affect further routing of frozen food and other commodities. In reply on May 28, 1971, CP wrote:

from the standpoint of our well known service deficiencies during the first few months of 1971 account snow problems, threatened rail strike, etc. . . .
I would certainly echo this but, at the same time, want to respectfully point out to you something which has been told to me in the most emphatic of terms; my job, and the jobs of those under my jurisdiction, consists of getting all possible traffic to move via Brownville Junction and the BAR. Service, equipment, politics, and any other considerations notwithstanding, the intention of Senior Officials of CP Rail is that we bend every effort in this direction.
I have also been told by my superiors that similar instructions have been given to BAR personnel, by Senior Officers of that Company. Chip, Gerry, and I are all working under these instructions and we certainly have, do, and will continue to appreciate all the help that you and your people can give us. Knowing that my two Associates are headed for the County next week I am giving them copies of this letter for their information and for possible discussion.

BAR replied on June 2, 1971, that its intentions were to route every possible BAR origination and termination via Brownville Junction, that it and CP were working for the same goal, and that they (BAR) had no intention to change. In late 1971, for example, BAR was able to have a frozen food movement of six cars a week for a year routed via Brownville Junction.

Although Great Northern and Fraser normally controlled the routing of shipments to and from their plants, certain large customers were allowed to route the goods they ordered. Great Northern and Fraser followed such a customer's requested standard route "explicitly" unless it was able to persuade the consignee to change to lower-rated differential routes.

CP was aware of Great Northern's and Fraser's routing policy, and also that Great Northern and Fraser opposed carrier solicitation of their customer. Using the information supplied by BAR, however, CP's solicitation campaign was "judicious as well as thorough in . . . exerting a steady pressure on their (Great Northern) customers to influence routing via ours (CP), while avoiding the actual appearance of attempting to exert influence upon Great Northern which will be resented." On April 4, 1974, after continuous solicitation of customers had already taken place, CP requested and received permission from Great Northern to solicit a large paper customer.

Another practice of Great Northern was to consistently request routings of its own purchase orders of commodities which it received. As the only receiver of inbound woodpulp, Great Northern had previously indicated to MEC that two-thirds of its inbound woodpulp traffic would include MEC in its routing requests. In 1969, MEC enjoyed close to 74 percent of the woodpulp traffic. During the 1970-1974 period, however, MEC's share of woodpulp traffic ranged between 23 and 46 percent.

It was also Great Northern's intention to give MEC two-thirds and CP one-third of its inbound clay traffic. However, MEC's participation in BAR inbound clay traffic subject to diversion fell from approximately 80 percent in 1969 and 1970 to 46 and 38 percent in 1971 and 1972, respectively. Its participation in clay traffic did return to approximately 80 percent in 1973 and 1974.

Maine Central participation in all BAR traffic subject to diversion is detailed by commodity for the years 1969 to 1974, in Appendix C.

On February 4, 1975, CP wrote to the BAR requesting permission to terminate the BAR-CP agreement. This permission was needed because neither party gave notice in July, 1974, under the terms of the agreement, that it

wanted the agreement terminated. On February 18, 1975, BAR agreed to terminate the agreement retroactive to January 1, 1975.

DISCUSSION AND CONCLUSIONS

This proceeding involves several novel issues arising from an alleged violation of section 3(4) of the act. The basic questions to be answered are (1) whether the preferential solicitation practices of BAR pursuant to BAR CP agreement were violative of section 3(4), (2) whether a federal statute of limitations governs a cause of action under the act brought between carriers, and (3) whether damages were properly awarded under the circumstances present in this proceeding. Each of these questions will be addressed in turn.

Section 3(4) Violation

The obligations of a carrier toward its connecting line are governed by section 3(4) of the act, which provides:

> All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, *or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper.* As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III. (Emphasis added).

The Administrative Law Judge, citing case law which will be discussed, *infra*, held in his initial decision that

section 3(4) prohibits a carrier from indirectly inducing a shipper "to do that which the carrier shall not do directly, i.e., induce the shipper to prefer in the routing of freight one of the carrier's connections over another." In finding that BAR solicitation of freight via CP was without regard to service considerations, the Administrative Law Judge concluded that "Bar, aided by CP, unlawfully exercised its discretion in the allocation of freight originated and terminated on its line by inducing shippers to divert from MEC and its connection B&M to CP."

A review of the relevant case law is essential at this time for an understanding of the Administrative Law Judge's disposition of this issue. In 1923, the Commission approved pursuant to section 5 of the act the acquisition of control of Central Pacific by Southern Pacific Company,[2] and imposed a condition[3] which required the Southern Pacific to engage in preferential solicitation on behalf of the transcontinental Central Pacific - Union Pacific route through Ogden, Utah. This condition was subsequently extended by private agreement[4] between Union Pacific Railroad

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[2] *Control of Central Pacific by Southern Pacific*, 76 I.C.C. 508 (1923).

[3] Condition (e) That the Southern Pacific Company shall cooperate with the Union Pacific Railroad Company to secure by active solicitation the routing of the maximum of freight traffic via the lines of the Union Pacific Railroad Company and the Central Pacific Railway Company through the Missouri River and Ogden, Utah, as parts of one connected continuous line, between all points in California and Oregon north of and including Caliente and Santa Margarita, Calif., and south of and including the Klamath Falls branch and Kirk, Oreg., on the one hand, and points north and west of a line along the northern boundaries of Oklahoma and Arkansas, to the Mississippi River, thence along the Mississippi and Ohio Rivers (but not including the intermediate cities on the Ohio River) to Wheeling, W. Va., and thence on a line drawn just east of Pittsburgh, Pa., and Buffalo, N.Y., to Niagara Falls, N.Y.

[4] The agreement states, "the parties * * * shall cooperate to secure by active solicitation the *routing of the maximum* of freight traffic via Union Pacific and Central Pacific lines * * *. "It is understood that such traffic as has origin or destination east of the

Company and Southern Pacific which additionally required the Union Pacific to solicit preferentially solely on behalf of Southern Pacific and to route preferentially all unrouted traffic via each other's lines. The agreement was never approved by the Commission, and was never filed with the Commission until a proceeding to reopen the 1923 decision of the Commission was commenced by the Denver & Rio Grande Western Railroad in 1957.

Upon reopening and after a full hearing, the hearing examiner issued his recommended report and order, served September 16, 1960, and found that the existing preferential solicitation, routing, and distribution of traffic, pursuant to the Commission imposed condition and the supplemental agreement of Union Pacific and Southern Pacific, violated section 3(4) and 15(1) of the act in light of present-day facts and circumstances. The hearing examiner recommended that the condition be modified by striking the name of the Union Pacific as the only and exclusive connection of the Southern Pacific on traffic to and from the designated territories, thus permitting any connecting line carrier of the Southern Pacific to participate on an equal basis for such traffic.

On exceptions, the Commission differed with the conclusions of the examiner and issued its first supplemental report, 317 I.C.C. 469 (1962), which held in a 6 to 5 decision that the 1923 condition was not unjust, unreasonable, or contrary to the public interest, and that the legality of the 1924 agreement and actions thereunder were improperly considered and must be raised in a separate complaint proceeding. On appeal by the Rio Grande, the District Court in *Denver & Rio Grande Western Railroad* v. *United*

Missouri River will be *solicited and routed* via the Union Pacific between the Missouri River and Ogden, and via the Southern Pacific west of Ogden; such traffic as has origin or destination west of the Miessouri River will be *solicited and routed* via Ogden so as to afford Union Pacific and Southern Pacific respectively the longest practicable haul." (Emphasis ourt.)

States, 229 F. Supp. 249 (D. Colo. 1964), reversed and remanded that decision to the Commission, stating:

> The petition here before us raised issues relating to the preferential solicitation and distribution between the Southern Pacific and the Union Pacific. This preferential solicitation was attacked as being improper or illegal under several sections of the Act as well as the antitrust law. *The origin and the authority for these practices were contained in both condition (e) and the 1924 agreement. These two items constituted the physical evidence of the authority for the practice, but it was the practice, or the authority for the practice, which was attacked by the plaintiff, and where this authority might be physically found would seem to be of minor importance. Thus in effect there was but one general issue before the Examiner and before the Commission, although in somewhat different context.* * * * (Emphasis added). 229 F. Supp. at 254.

The Court thus directed the Commission to consider the validity under the Interstate Commerce Act of the agreement entered into between the Southern Pacific and the Union Pacific in 1924, as well as the actions of the parties to such agreement.

Pursuant to the Court's direction, the Commission considered all issues and evidence, including those relating to the 1924 Agreement and the actions of the parties as well as the language of condition (e) itself. The Commission, after consideration of the full record, issued its second supplemental report, 328 I.C.C. 345 (1966), and found "that the present effect of the discriminatory practices against the Rio Grande in the preferential solicitation and routing of traffic results in a stifling of competition between the Union Pacific and the Rio Grande on transcontinental traffic." 328 I.C.C. at 356. Noting the "changed

circumstances and developments since [the] imposition [of] condition (e) in 1923," the Commission concluded that condition (e) is no longer just and reasonable. It further concluded that the practice of mandatory preferential routing of all unrouted traffic (which was not mentioned in condition (e) but was included in the 1924 agreement) constitutes an undue prejudice against Rio Grande in violation of section 3(4) of the act, since the preferential treatment was not justified by differences in operating conditions and the through routes of the Southern Pacific formed at Ogden with the Union Pacific and the Rio Grande were substantially similar.

In its only other reference to the preferential solicitation practices of Union Pacific, the Commission stated:

> [T]he provisions for mandatory and exclusive routing of all unrouted traffic are contrary to the national transportation policy for the same reasons as are the preferential solicitation provisions in the 1924 agreement. No provision of the Pacific Railroad Acts [requiring that Central Pacific and Union Pacific be operated as one continuous line] is found to justify mandatory preferential solicitation much less undue prejudice against connecting lines in the distribution of unrouted traffic and the attendant economic disadvantage contrary to section 3(4). 328 I.C.C. at 357-58.

The Commission thus ordered that condition (e) "be modified by striking therefrom the name of Union Pacific as the only connection of Southern Pacific on traffic moving via Ogden between the designated territories" 328 I.C.C. at 357. The effect of this was to put Rio Grande and Union Pacific in an equal competitive position with regard to such traffic. The Commission further ordered that the 1924 Agreement (and any agreements or memorandum of understanding pursuant thereto) be canceled or amended to accord with condition (e) as modified.

A close reading of the Commission's language reveals that the Commission distinctly held the preferential routing agreement a violation of section 3(4) of the act, and both the preferential routing agreement and the Union Pacific's preferential solicitation, which resulted in a stifling of competition, as contrary to the public interest and national transportation policy. 328 I.C.C. at 356. Preferential solicitation, therefore, was not specifically brought under the prohibition mandated by section 3(4) of the act.

On appeal, the District Court in *Southern Pacific Company* v. *United States*, 277 F. Supp. 671 (D. Neb. 1967), affirmed per curiam, 390 U.S. 744 (1968), sustained the report and order of the Commission. In one respect, however, the District Court went beyond the Commission's decision. The Commission had held preferential routing to constitute a violation of section 3(4), but had declined to make such a finding with regard to preferential solicitation. On the basis of the facts before it, however, the District Court also construed section 3(4) as prohibiting preferential solicitation, and stated its reasons as follows:

> Plaintiffs urge that this holding is erroneous since there exists no proof (other than evidence received in 1922 that at that time from 2 to 4 percent of freight was unrouted) that sufficient shipping was affected to create "undue prejudice" at the present time by reason of the preferential routing. However, this overlooks the fact that the agreement attacked involves preferential solicitation as well as preferential routing, and that between the two practices 100 percent of the freight originated by the plaintiffs and *not routed before the railroad is contacted*, is either solicited or directly routed for the plaintiffs. (Footnote omitted)
>
> The prohibition of Section 3(4) is against discriminatory conduct of the carrier against connecting lines. The Act cannot be circumvented by wrongfully induc-

ing the shipper to commit the discrimination in place of the carrier. In other words, the legislation is not to be so weakly construed that it permits the carrier to accomplish indirectly what he cannot do by direct preferential routing. In view of the clear policy expressed by the statute, we see no meaningful distinction between arbitrarily soliciting the unrouted freight at that time and arbitrarily routing it should the shipper leave it unrouted.

The statute must be interpreted broadly to effectuate its purposes in the public interest.

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In *Western Pac. R.R. Co.* v. *United States,* 382 U.S. 237 (1965), . . . the Supreme Court said:

"In the absence of any settled construction of § 3(4), then, its manifest purpose to deprive railroads of discretion to apportion economic advantage among competitors at a common interchange must be the basic guide to decision."

Thus, we feel that preferential solicitation when done on a "preconcerted" and "systematic" discriminatory basis as conducted by the parties herein, falls within the statutory prohibition of Section 3(4) as well. The preferential solicitation dictated by the agreement is without concern for competitive benefits of similar lines and without relationship to the best possible service to the shipper. It is as much an opportunity of "economic advantage" as direct routing itself.

• • • •

Discrimination on a purely arbitrary anticompetitive basis, where the connecting lines prejudiced offer equal facilities and service, is far outside the scope of permissible activity and must be disapproved. (Footnote omitted). 277 F. Supp. at 685-86.

We concur with the foregoing construction of section 3(4), and consequently find that, absent special circumstances, preferential solicitation pursuant to an agreement between two carriers and without regard to service considerations can be violative of section 3(4).

Section 3(4) is a procompetitive statute, specifically providing that a carrier shall not "unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper." The Courts have repeatedly rejected all attempts to limit the applicability of section 3(4), holding that its requirement of equal treatment of connecting lines should be broadly construed. See, e.g., *Western Pacific Railway Co.* v. *United States,* 382 U.S. 237 (1966); *Arrow Transportation Co.* v. *United States,* 176 F. Supp. 411, 418-19 (D. Ala. 1959), affirmed per curiam, 361 U.S. 353 (1960).

Moreover, the particular portion of section 3(4) which governs the cause of action brought in this proceeding was enacted pursuant to the Transportation Act of 1920, 41 Stat 456, without any legislative history that we could find. It is proper, therefore, that we construe the provision which prohibits a carrier from unduly prejudicing any connecting line in the distribution of traffic in context with the underlying purpose of section 3(4) and the principles delineated in the National Transportation Policy.

As stated by the court in *Southern Pacific, supra,* preferential solicitation without regard for service considerations can wrongfully induce the shipper to route traffic over a particular connecting carrier's line. Although a shipper may consciously choose a certain route, the traffic so routed is not specifically routed within the meaning of section 3(4) when the shipper has been the subject of solicitation practices which are without concern for competitive benefits of similar lines and without regard to the best possible service to the shipper.

We are acutely aware that preferential solicitation agreements are to a certain extent commonplace in the railroad industry, and that railroads often solicit their best revenue routes and/or their best service routes. Our decision in this proceeding is neither intended to interfere with a carrier's right to ask shippers to route their traffic over one of two or more through routes to which it is a party, nor is there any provision in the Interstate Commerce Act which prevents the solicitation by a carrier of traffic over a particular through route as the interest of the soliciting carrier and the shipper may dictate.

We do find, however, that in the publicly regulated field of interstate railroad transportation, an originating carrier and one of its connecting lines cannot sit down privately and negotiate agreements to carve up the transportation market between themselves without regard to the service characteristics, i.e., transit times, dependability, equipment, car supply, etc., of another similarly situated connecting line.

Normally, each individual carrier is expected to solicit business on its own behalf, and merely to inform shippers (without preference) of the availability of the two alternative routes beyond its own line. Specifically, as applied to the instant proceeding, BAR could vigorously solicit business for itself in a normal competitive situation, but exert no influence on the shipper as to whether the movement beyond its own line should be via MEC – B&M or CP. Each connecting line would then have an equal opportunity to solicit such business for themselves.

The natural result of such a competitive situation, in which each carrier vigorously seeks to promote its own interests without discrimination in favor of or against any particular connecting line, is economic benefits to the shippers and the public by promoting the best possible service at the lowest possible cost. Preferential solicitation

by a carrier of its own lines, therefore, cannot violate section 3(4) since there can be no arbitrary apportionment of economic advantage when such a carrier prefers itself based on the advantages it has derived from the normal competitive forces in the market place.

When an originating carrier, however, by itself or pursuant to an agreement with one of its connecting lines, arbitrarily prefers and preferentially solicits traffic over one connecting line when another connecting line is similarly situated, a violation of section 3(4) will occur upon a finding of undue prejudice to the disadvantaged connecting line.

The facts in this proceeding, as established by the Administrative Law Judge in his initial decision, clearly show that (1) BAR and CP entered into a formal agreement which obligated BAR to favor CP over Maine Central in the distribution of traffic by virtue of the joint preferential solicitation of inbound and outbound traffic, (2) BAR prepared and distributed routing guides which showed CP routes only, (3) BAR refused to accept Canadian National cars for a period of three to four months so as to induce a shipper to use CP cars and thus route CP, (4) BAR solicited freight via CP despite consignee complaints of service, (5) BAR recommended CP routes to shippers as the best service route without any knowledge of service differences between CP and MEC routes, (6) BAR provided computer printouts to CP covering BAR originations and terminations so that the CP sales team could solicit consignees of outbound freight and shippers of inbound freight to route via CP, and (7) CP would not have embarked on its intensive on-line and off-line solicitation campaign without BAR's backing and shipment information.

The Administrative Law Judge also noted that Mr. Strout of BAR admitted that a diversion of some freight, including paper, from Northern Maine junction to Brownville June-

tion resulted from the BAR-CP Agreement, and that Mr. Watson of CP conceded that CP's sales effort had a "modicum of success," although BAR's anticipated diversion of 24,000 cars did not materialize.

Moreover, BAR's understanding of the agreement was it was they were obligated to solicit *whatever traffic possible* via Brownville Junction. This understanding is of special significance since some shippers on BAR's line did not know there were two gateways, and BAR station agents had never before solicited until 1970.

After careful consideration of a comprehensive record and of the accompanying voluminous exhibits, we generally concur with the conclusion of the Administrative Law Judge, and find that BAR, aided by CP, unlawfully exercised its discretion in the preferential solicitation of traffic via CP to the detriment and undue prejudice of MEC and B&M.

The fact that some of the BAR-CP routes may have been superior to the competing MEC-B&M routes is not pertinent when the record conclusively establishes that the agreement and solicitation practices were initiated by BAR and CP without regard to the service considerations of each connecting line and with the knowledge that a substantial diversion of traffic would seriously harm both MEC and B&M. Additionally, we decline to make any inferences based on conflicting evidence with respect to the motives underlying the BAR-CP agreement, since the finding of a section 3(4) violation in this proceeding rests not on intent, but on the determination that unlawful preferential solicitations took place which unduly prejudiced a connecting line in the distribution of traffic.

The BAR and CP preferential solicitation arrangement in effect was a reciprocal sponsorship of each other's routes in a team sales effort to induce shippers to use their combined routes to the exclusion of other carriers. Such a

reciprocal arrangement had a substantial effect on the transportation market involved, as evidenced by the decline in traffic experienced by MEC and B&M through the Northern Maine Junction. It would be inapposite for BAR and CP to maintain that the BAR-CP agreement promoted competition when a normal competitive situation presupposes that each connecting line has equal advantage and opportunity to solicit shippers.

The agreement itself, therefore, is not violative of section 3(4). It is the practices pursuant thereto which are evidence of the unfair advantage that can result when two carriers jointly agree to solicit as much traffic as possible through a particular gateway. The preferential solicitation described herein enabled BAR, without regard to service considerations, to apportion its economic advantage as an originating carrier among its similarly situated connecting lines. Thus, BAR violated section 3(4) if undue prejudice to its connecting line resulted from such practices.

Both BAR and CP argue in their exceptions that neither MEC nor B&M have shown any undue prejudice resulting to them. Whether or not undue prejudice exists, however, must be determined not only from the surrounding transportation conditions, but also from consideration of the results which flow from the action in question to the shippers, carriers, and general public. As a question of fact, such a finding of undue prejudice in this proceeding is warranted by substantial evidence in the record which shows that complainants MEC and B&M suffered injury by reason of the BAR-CP agreement and the practices thereto, and that a positive advantage accrued to BAR and CP. We find, therefore, that the Administrative Law Judge properly concluded that MEC and B&M were unduly prejudiced in the distribution of traffic in violation of section 3(4) of the act.

Several defenses raised by BAR and CP must now be

considered. In their exceptions, both BAR and CP contend that there can be no violation of section 3(4) because there is no common interchange point. They argue, therefore, that since BAR gives its traffic to CP and MEC at different interchange points, there can be no discriminatory treatment of MEC with respect to the CP traffic, and hence no violation of section 3(4).

The Administrative Law Judge, in rejecting this argument, stated that the term "common interchange" is not limited to the same physical connection or to separate physical connections within the same terminal area. In finding that distance is not controlling in the determination of a common interchange, *New York and Northern Railway Co.* v. *New York and New England Railroad Co.*, 50 Fed. 867. (Cir. S.D.N.Y. 1892), the Administrative Law Judge concluded that MEC via Northern Maine Junction and CP via Brownville Junction are similarly situated to BAR movements, and thus in effect share a common interchange.

In a previous case before the Commission, *Ingot Molds, Ohio and Pa. to Cypress, Tex.*, 349 I.C.C. 102 (1975), we recently recognized that a common physical interchange is not a prerequisite for a carrier to be a connecting line under section 3(4). Similarly, the relevant transportation circumstances and conditions at Brownville Junction and Northern Maine Junction with respect to movements to and from BAR are sufficiently identical to warrant the finding that a common interchange exists for purposes of establishing a section 3(4) violation. We concur, therefore, with the conclusion reached by the Administrative Law Judge in his initial decision.

BAR further contends in its exceptions that BAR cannot violate section 3(4) with respect to inbound traffic because it is not in a position to distribute it, and thus it is not possible either physically or legally for BAR to "distribute" traffic that terminates on its line. It is clear, however, that the evil to be prevented under the provisions of section 3(4) pertinent herein is unlawful preferential solicitation which *results* in the wrongful inducement of shippers who route their traffic.

The opinion in *Southern Pacific, supra,* does not make any distinction between inbound and outbound traffic. Moreover, the BAR-CP agreement contemplated diversion to CP routes of inbound traffic. With the knowledge that shippers on the BAR line often route their traffic as requested by their customers, it would be incongruous to construe section 3(4) so narrowly as to restrict its application only to forwarded traffic. We concur, therefore, with the conclusion of the Administrative Law Judge that "it matters not whether the traffic diverted by reason of unlawful preferential solicitation consists of inbound or outbound freight."

Statute of Limitations

Respondent-defendant BAR argues in its exceptions that the two-year limitation period contained in section 16(3)(b) of the act should apply to complainants' damage claims, and that application of section 16(3)(b) thus bars the complainants from recovering damages for any car delivered or tendered more than two years prior to the filing of MEC's and B&M's complaints. Complainant MEC reasserts the position taken by the Administrative Law Judge that the limitation provisions of section 16(3) have application to actions between shippers and carriers only, and recites the existing precedent followed by the Administrative Law Judge in his initial decision. *Thompson* v. *St. Louis-San Francisco Ry.*, 218 F.2d 166 (8th Cir. 1955), *cert. denied*, 348 U.S. 964 (1956); *Atlantic Coast Line R.R. Co.* v. *Baltimore & Ohio R.R. Co.*, 12 F.Supp. 711 (D. Md. 1935). The Commission has never previously ruled on the applicability of section 16(3)(b) to actions between car-

riers, and this instant proceeding requires that we address the issue for the first time.

Section 16(3)(b) of the act provides that:

> (b) All complaints against carriers subject to this part for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d).

The Administrative Law Judge did not apply section 16(3)(b) to this proceeding because of his reliance on two federal court cases, *Atlantic Coast Line, supra*, and *Thompson, supra*, which suggest that section 16(3)(b) is not applicable to actions between carriers either before the Commission or at law. The Administrative Law Judge found, therefore, that in the absence of any applicable federal statute of limitation the state statute applies. He did not discuss, however, which state statute, if any, should apply to this proceeding.

We cannot agree with the conclusion of the Administrative Law Judge that section 16(3)(b) is inapplicable to actions between carriers who file their complaints before the Commission in accordance with section 13(1) of the act. In light of our responsibility to interpret the statutory provisions which we administer, and after a thorough examination of the legislative history, we find that section 16(3)(b) is applicable to actions between carriers subject to part I of the act.

Defendant BAR argues that the two federal court cases contrary to this position are poorly reasoned, totally unpersuasive, and would severely undercut the basic policy of uniformity and equality behind the enactment of section 16(3). Moreover, defendant BAR contends that the *Atlantic Coast* court's referral to section 16(3)(b) was pure dicta lacking any supporting authority, since the court's statutory interpretation was unnecessary to the disposition of the proceeding before it.

Although we are not prone to disregard existing court precedent, no matter how scant or old, we agree with BAR's general appraisal of those parts of the decisions in *Atlantic Coast* and *Thompson* which pertain to the statutory construction of section 16(3)(b). The following examination of these cases supports our view that the court's construction of section 16(3)(b) was improperly decided.

In *Atlantic Coast* plaintiff railroad sought an accounting from another railroad with respect to a fair division of joint rates for transportation of citrus fruit. After citing sections 16(3)(a), (b) and (c) of the Interstate Commerce Act, the district court in *Atlantic Coast* commented that "[t]hese provisions seem to contemplate actions or complaints between carriers and shippers, and not between carriers only . . . . Therefore, as there is apparently no applicable federal statute of limitations, the state statute, rather than no statute, governs." 12 F. Supp. at 718.

The court in *Atlantic Coast* and the Administrative Law Judge in his initial decision are clearly correct in stating the general rule of law that when a federal statute creates a wholly federal right but specifies no particular statute of limitations to govern actions under the right, the state statute of limitations for analogous types of actions should apply. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). This rule can only apply, however, after a determination that Congress did not intend section 16(3)(b) to apply to actions between carriers, although the clear language of this provision states that *all* complaints against carriers shall be filed within two years from the time the cause of action accrues.

The court in *Atlantic Coast*, without describing any rationale or authority for its statutory construction of the provisions in section 16(3), simply stated that these provisions [sections 16(3)(a-c)] "*seem to contemplate* actions between carriers and shippers, and not between

carriers only." (Emphasis added). Courts should not speculate as to the probable intent of Congress, apart from the literal language of the statute, unless they are prepared to inquire into the legislative intent of the particular provision in question and the general purpose of the entire statute. The court in *Atlantic Coast* failed to give first reference to the literal meaning of the words employed in the statute, *United States* v. *Second National Bank*, 502 F.2d 535 (5th Cir. 1974), *cert. denied*, 421 U.S. 912 (1975), and did not attempt properly to ascertain the legislative intent of Congress with respect to section 16(3)(b). We cannot, therefore, feel bound by its statutory construction of this provision.

In the second case cited by the Administrative Law Judge, the court in *Thompson* similarly held that the time limitations in section 16(3) were not applicable to actions between carriers. The suit in *Thompson* arose out of a dispute between several carriers over the division of revenue arising from the tank car transportation of crude petroleum oil. Defendant carriers contended that plaintiff carriers' cause of action was barred by sections 16(3)(a) and 16(3)(e) of the act, in that the suit was not begun within two years after the cause of action accrued.

In an opinion by Judge Woodrough, the *Thompson* court stated that this precise question was considered in *Atlantic Coast*, and that they are in accord with the declaration in *Atlantic Coast* that section 16(3) (a-c) seem to contemplate actions or complaints between carriers and shippers, and not between carriers only. Judge Woodrough added, however, that the *Atlantic Coast* decision "appears to have been accepted by the railroads since its promulgation in 1935 without any protest that we know of by the Interstate Commerce Commission which is primarily charged with the railroad "regulation involved in divisions from interterritorial hauls." 218 F.2d at 172.

In a concurring opinion in *Thompson, supra,* at 173, the issue of section 16(3) applicability was significantly commented upon by Judge Johnson:

> The only portion of the opinion that has bothered me somewhat is the construction made of 49 U.S.C.A. § 16(3)(a) and (e), through the adoption of Judge Chesnut's language in *Atlantic Coast Line R. Co.* v. *Baltimore & O. R. Co.*, D.C. Md., 12 F. Supp. 711, 717, that "These provisions seem to contemplate actions or complaints between carriers and shippers, and not between carriers only." I can see no reason on the statute to believe that, when Congress deemed it advisable in the interest of uniformity and certainty, to impose a limitation on "All actions at law by carriers * * * for recovery of their charges, or any part thereof", it was in any way concerned about or intending to have regard for any theories, forms, technicalities and distinctions in common law actions or recoveries. I think it was fixing a time, as a general transportation-code policy, within which a carrier had to act to recover its transportation charges or revenues against anyone who owed it the duty of making payments thereof as such.
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> * * *
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> Both of my colleagues, however, feel that Judge Chesnut's construction of the statute has probably had such acceptance and reliance in the railroad world as to be entitled to stand on the basis of stare decisis. I am without any enlightenment or data in the situation on this score, either from the briefs or otherwise, but I shall, for the sake of unanimity, go along and accept my colleagues' respected view on the point.

Although Judge Johnson was specifically referring to sections 16(3)(a) and (e) of the act, we feel that his comments concerning the Congressional intent behind the

limitation provisions of section 16(3) are correct, and that the 1935 statutory construction of section 16(3) cannot stand in light of a close examination of the relevant legislative history. It is appropriate, therefore, that we trace the evolution of section 16(3)(b) in order to ascertain whether this limitation provision is applicable to actions between carriers as presented in this proceeding.

Every statute is to be construed with reference to its intended scope and to the purpose of the legislature in enacting it. *Commissioner of Internal Revenue* v. *Maguire*, 111 F.2d 843 (7th Cir. 1940), *affirmed*, 313 U.S. 1 (1940). Section 16(3) has its genesis in Section 5 of the Hepburn Act, approved June 29, 1906 (Effective August 28, 1906), Pub. L. No. 337, 34 Stat. 584, 590, *amending* Interstate Commerce Act, 49 U.S.C. § 1 *et seq.* (1887), which provided in part that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues. . . ." Other provisions in Section 5 of the Hepburn Act allowed for suit by complainants in circuit court and described the appropriate procedure for complainants to follow in enforcing a Commission order.

The accompanying House Report No. 591, 59th Congress, 1st Session, January 27, 1906, stated:

> The fifth section is an amendment to section 16 of the act of 1887, as amended by the act of 1889, and is intended to aid complainants in whose behalf damages are awarded on complaint by the Commission.

There is no indication whatsoever that the amended language in section 16 of the act was narrowly meant to apply to actions between shippers and carriers only. Congress was in fact amending major legislation which had been enacted to allow for federal regulation of all aspects of interstate commerce, and Congress did not limit or prescribe the character of complaints when it wrote the original language of section 16(3)(b).

The next material amendment of section 16 of the act was enacted by the Transportation Act of 1920, 41 Stat. 456, 491, which renumbered section 16 into thirteen paragraphs. New paragraph 16(3) provided in part:

> All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, unless the carrier, after the expiration of such two years or within ninety days before such expiration, begins an action for recovery of charges in respect of the same service, in which case such period of two years shall be extended to and including ninety days from the time such action by carrier is begun.

In House Report No. 456, 66th Congress, 1st Session, November 10, 1919, which accompanied House bill H.R. 10453, the report described the preceding amendment to section 16 in the following manner:

> Limitation of actions by and against carriers.—Section 422 amends section 16 of the commerce act so as to limit the period in which carriers may bring actions for the recovery of their charges to three years from the time the cause of action accrued. Complaints for the recovery of damages by the shipper are to be filed by the shipper within two years from the time the cause of action accrues. In order to cover the case where the carrier, when the shipper's right of action has expired, begins an action for damages in respect to the same service on which the shipper's complaint is based, the shipper's period of two years is extended to 90 days from the time action by the carrier is begun. The amendment also provides that in case either of action by the carrier or of complaint by the shippers,

> the cause of action shall be deemed to accrue upon delivery or tender of delivery by the carrier.

The subsequent conference bill retained the provision as it appeared in the House bill, but the accompanying Conference Report No. 650, 66th Congress, 2d Session, February 18, 1920, did not describe the limitation provisions in the same manner as the House report:

> Section 424 [sic] of the House bill provided that all actions at law by carriers for recovery of charges shall be brought within two [sic] years from the time the cause of action accrues; and that all complaints for the recovery of damages shall be filed with the Commission within two years after the cause of action accrues, unless the carrier after the expiration of such two years, or within 90 days before such expiration, begins an action for recovery of charges in regard to the same service, in which case such period of two years shall be extended to 90 days from the time the carrier's action is begun. In either case, the cause of action shall be deemed to accrue upon delivery, or tender of delivery by the carrier. This provision was not contained in the Senate amendment. The conference bill retains the House provision as it appeared in the House bill.

Whereas the House Report described the filing of complaints for the recovery of damages as pertaining to the complaints of shippers, the subsequent Conference Report did not describe the complaint provisions of the statute solely in terms of shipper complaints. Although it is apparent that the new language in section 16(3) of the Transportation Act of 1920, which *expanded* upon the original language in the Hepburn Act, seems to contemplate actions between shippers and carriers, it is our opinion that Congress did not intend to circumscribe the original scope of this limitation provision. Thus, even if the House may

have had in mind controversies between shippers and carriers when drafting the amendment to the existing statute of limitation language, it did not preclude this statute of limitation from applying to actions between carriers. As succinctly stated by the Court of Appeals in *Louisville & Nashville R.R. Co.* v. *Cory*, 54 F.2d 8, 10-11 (6th Cir. 1931), with respect to the application of section 16(3)(b) to rights of recovery at common law:

> It is clear that if a cause of action is created by an act of Congress, the statute of limitations fixed by such act must govern. It would also seem that if the complaint deals with a matter of administration and regulation of interstate commerce, as to which Congress has thus occupied the field reserved to it by the Constitution, the separate statutory laws of the several states dealing with the same subject matter will be superseded.

Finally, section 16(3) as it now reads was enacted pursuant to the amendment of June 7, 1924, Pub. L. No. 247, 43 Stat. 633, *amending* 49 U.S.C. § 16(3) (1920), which subdivided paragraph (3) into paragraphs (a) to (h) inclusive. The current limitation of action provisions of section 16(3) were therein written as to delineate more clearly those actions which pertain to recovery of charges, overcharges, damages not based on overcharges, and several other provisions not here relevant.

In the accompanying House Report No. 796, 68th Congress, 1st Session, May 20, 1924, which referred to Senate bill S. 2704, the report describes section 16(3) as follows:

> Paragraph 3 of section 16 of the interstate commerce act, as amended, pertains to limiting of the right to bring causes of actions by the carriers against shippers and by shippers against the carriers. All actions at law by carriers for recovery of their charges shall be begun within three years after the cause of action

> accrues. The shipper under existing law has two years in which to bring his action for the recovery of damages from the carrier. The shipper can proceed by two methods: He can complain to the Interstate Commerce Commission or he can bring suit for damages. In claims for reparation he makes complaint to the commission; and generally, in claims for straight overcharges, he brings a court action in the first instance to recover the amount due him for a charge which is in excess of the published tariff.

The House report obviously construes the provisions of section 16(3) as applicable to actions between shippers and carriers, but in no manner negates the applicability of section 16(3) to actions between carriers. The fact that a future Congress may have had one objective in mind when interpreting the purpose of an amended statutory provision does not obviate any other objectives a prior Congress may have intended to achieve through major reform legislation. See *Hackley* v. *Roudebush*, 520 F.2d 108, 142 (D.C. Cir. 1975). Moreover, it has been recognized that the views of one Congress as to construction of a statute adopted many years before by another Congress have very little, if any, significance, *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968).

In light of its prior history and the clear language of the statutory provision, we conclude that section 16(3)(b), standing as a limitation for the filing of all complaints against carriers for the recovery of damages not based on overcharges, can be reasonably construed to include actions between carriers subject to Part I of the act. As stated in *United States* v. *Bornstein*, 423 U.S. 303 (1976), "the absence of specific legislative history in no way modifies conventional judicial duty to give faithful meaning to language Congress adopted in the light of the evident legislative purpose in enacting the law in question."

Additionally, in determining legislative intent, we feel it is our duty to favor an interpretation which would render statutory design effective in terms of policies behind its enactment and to avoid interpretations which would make such policies more difficult of fulfillment. Cf. *National Petroleum Refiners Association* v. *FTC*, 482 F.2d 672, 689 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). Thus, uniform adjudication of damage claims brought before this Commission in actions between carriers necessitates that a federal statute of limitations govern such causes of action which arise under the act.

Application of section 16(3)(b) to the instant proceeding, therefore, requires that we make certain findings with respect to whether or not section 16(3)(b) was tolled by any of BAR's actions, and if complainants were sufficiently diligent in timely bringing their claim for damages before the Commission.

Defendant BAR argues in its exceptions that (1) since section 16(3) is jurisdictional, it cannot be tolled by acts of the defendants, and (2) even if section 16(3)(b) could be tolled, complainants MEC and B&M knew or should have known they had a cause of action in 1970, and thus the statute of limitations should not be tolled on the facts of this case.

BAR, in support of its argument, contends that MEC was fully aware of all the significant facts about the BAR-CP agreement before it was signed at the end of July 1970, that MEC and B&M had already launched their counter-solicitation effort in 1970, and that Mr. Miller of MEC had claimed in September 1970, "it is no secret that Mr. Dumaine entered into a little hanky-panky with the Canadian Pacific."

Complainants MEC and B&M reply that BAR and CP intentionally concealed the duration of the BAR-CP agreement, the nature of the car allowances, the number of cars

expected to be diverted, and other terms essential to its purpose and execution. Complainant MEC also notes that Mr. Miller wrote Mr. Dumaine and Mr. Crump of the CP, in August and November of 1970, respectively, to request a copy of the agreement, and each time received a negative response. Furthermore, Mr. Strout of the BAR wrote MEC on February 27, 1970, stating "it has never been the policy of this company to solicit routings from the Great Northern Paper Company or other customers, and we have no intention of changing that policy." Complainant MEC concludes, therefore, that the fraudulent concealment of the material terms and scope of the agreement by BAR and CP tolled the running of the statute of limitations until July, 1972, when Mr. Miller of MEC obtained a copy of the BAR-CP agreement.

It is well-settled that the limitation provisions of section 16(3) are both remedial and jurisdictional, and that the complainant must affirmatively show that the statute has been complied with. *Phillips Co.* v. *Grand Trunk Western Ry. Co.*, 236 U.S. 662, 667 (1915); *Farmers Union Grain Term. Ass'n* v. *Canadian Natl. Rys.*, 315 I.C.C. 559, 561 (1962); *Associate Grocers of Colorado, Inc.* v. *A.T. & S.F. Ry. Co.*, 300 I.C.C. 17, 18 (1957). Thus, if section 16(3)(b) is not tolled on the facts as presented in the record, the damage claims of complainants MEC and B&M are diminished as to all traffic delivered or tendered for delivery two years prior to their filing of complaints before the Commission.

It is a rule of general application that the fraudulent concealment of the facts which render a transaction actionable tolls the statute of limitations, *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946). Furthermore, federal statutes providing for substantive liability may be tolled where the plaintiff has refrained from commencing suit during the period of limitation because of such fraudulent concealment.

American Pipe and Construction Co. v. *Utah*, 414 U.S. 538, 559 (1974). The complainants in this proceeding, therefore, must sustain their burden of showing (1) their failure to discover their cause of action prior to the running of the statute, (2) their exercise of due diligence, and (3) the fraudulent concealment, mistake, or misrepresentation which frustrated it. See *Laundry Equipment Sales Corp.* v. *Borg-Warner Corp.*, 334 F.2d 788, 792 (7th Cir. 1964).

After a review of the evidence in this case and the actions of BAR and CP with respect to their concealment of the material terms of the BAR-CP agreement, we find that the complainants have met the requisite burden of proof in order to support a claim of fraudulent concealment. Substantial evidence in the record supports the conclusion that complainants MEC and B&M exercised reasonable care and diligence in seeking to learn the facts of the BAR-CP agreement. We conclude, therefore, that section 16(3)(b) was sufficiently tolled to allow complainants MEC and B&M to recover for damages during the five-year existence of the BAR-CP agreement.

DAMAGES

Respondent-defendant BAR argues in its exceptions that the assessment of damages in this proceeding is not within the traditional expertise of the Commission, and that no case before the Commission has ever awarded damages, for a violation of section 3(4). BAR further asserts that even if the Commission may award damages under section 16(1) of the act, MEC and B&M failed to prove their damages with the exactitude and certainty required in a court of law. Finally, BAR and CP state that the Administrative Law Judge erroneously accepted the methodology used by MEC and B&M to support the calculation of their damages and claim of undue prejudice.

As found by the Administrative Law Judge in his initial decision, the Commission clearly has the authority to award damages for any violation of section 3(4). Section 16(1) of the act states:

> That if, after hearing on a complaint made as provided in section thirteen of this part, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

The fact that the Commission has never previously awarded damages with respect to a section 3(4) violation does not preclude our ability to do so, particularly since the instant proceeding is one of first impression.

MEC and B&M brought complaint proceedings under section 13(1) of the act, which specifies that "any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission. . . ." Furthermore, complainants chose to bring their action before the Commission, rather than initiate a suit for damages in court as permitted by section 9. The authority to award damages, therefore, and the award thereof, is properly within the jurisdiction of the Commission.

It is essential for a proper understanding of the issue of damages briefly to outline the methodology employed by the complainants in their computation of damages.

Complainants used 1969 as the base year to determine damages caused by lost revenues attributable to the diversion of traffic. The level of traffic in 1969 was reportedly comparable to that in 1968. Records prior to 1968 were not required to be kept and had been destroyed. MEC asserts

that 1969 reflects its historical proportion of freight participation over a number of years. Only BAR overhead originations and terminations which moved via MEC and CP and did not terminate on CP, MEC, and B&M were used in the computation. The percentage of the overhead cars handled by MEC to the total BAR overhead originations or terminations by commodity, less CP, MEC and B&M terminations, was determined for 1969. This percentage was applied to the BAR overhead traffic by commodities in the years 1970-74 to determine MEC's historical share from which MEC overhead cars handled was subtracted giving the MEC loss in cars. The loss in cars applied to the overhead average revenue per car of the commodity resulted in the revenue loss from which was deducted the estimated expenses for handling the cars to determine the net revenue loss. MEC also included as damages its solicitation expenses to counter the BAR-CP campaign. MEC's claimed net revenue loss and cost of solicitation after all expenses for the 5 years 1970-74 were $291,862, $366,934, $394,938, $234,189 and $302,515, respectively, and totaled $1,590,438. B&M's claimed net revenue losses for the same respective years, using the identical methodology, were $186,154, $192,209, $218,579, $12,097, and $79,291, and totaled $688,330. Both MEC and B&M sought simple interest of six percent from the end of each year in their final damage claim.

The Administrative Law Judge, stating that the precise dollar amount of the lost revenues after expenses could not be calculated, accepted without question the method of calculation employed by MEC and B&M. Noting that important destination evidence about the diverted traffic had been previously destroyed, and that the computer printouts provided to CP by BAR on the 24,000 cars in question were no longer available, the Administrative Law Judge stated that "MEC and B&M here could not be ex-

pected to offer any more definite evidence as to the extent of their damages than a comparison between their participation in the freight susceptible to diversion before 1970 and their participation during the 1970-74 period." An award of damages was thereafter entered against BAR for the full amount requested by MEC and B&M, together with the cost of MEC's counter-solicitation campaign and simple interest at 4 percent from the end of each year.

BAR asserts that the "historical share" analysis presented by MEC and B&M, and adopted by the Administrative Law Judge, is inadequate to establish proper damages in this case, since such an approach assumes that traffic patterns remain constant. Additionally, BAR avers that MEC and B&M have completely ignored market trends and changes, particularly in reference to alleged diversion of traffic to motor carriers, changes in routings due to service considerations, and a lengthy strike involving one shipper.

BAR suggests that proper proof of damages would be made by comparing shipments actually going over or coming through Brownville Junction for the years 1969-1974, and that complainants had available to them Brownville Junction interchange reports which purportedly listed every car interchanged, the shipper and point of origin, the receiver and destination, the commodity, the route, the waybill date and number, the car ownership and type, and the interchange date.

BAR thus argues that the complainants should have broken down shipments (1) by destination, so that evidence as to the actual service accorded to the same destination via CP or via MEC-B&M could have been heard, and actual proceeds and divisions MEC and B&M would have received if the car had gone via their lines could have been determined, and (2) by shipper or receiver, so that traffic changes due to factors other than the BAR-CP agreement could have been taken into account.

Although the method in computing damages as proposed by BAR is a proper method to assess accurately the pecuniary loss suffered by MEC and B&M, the existence of one method does not necessarily preclude another which is reasonably certain under the circumstances in this case. If BAR's methodology were employed complainants would have to determine which of some 60,000 cars interchanged between BAR and CP during 1970-1974 were unlawfully diverted, analyze each movement from each shipper to each destination in terms of the service characteristics of the route through each junction, and further attempt to distinguish which shippers or consignees were contracted by the preferential solicitation practices of BAR and CP. Utilization of such a method is impractical without the destination evidence and computer printouts which were unavailable to complainants, and there is no assurance that this procedure would identify the actual number of carloads illegally diverted.

Complainants have demonstrated, however, that some injury did occur as a result of the unlawful acts of BAR, and it is impossible under the circumstances in this proceeding and the nature of the violation for MEC and B&M to comply with Rule 100 of the Commission's General Rules of Practice. We find, therefore, that as a result of the section 3(4) violation described herein, complainants shall be permitted to recover the reasonably ascertainable revenues lost by virtue of the BAR-CP agreement and the practices thereto. Furthermore, we find that MEC and B&M are only entitled to damages in the amount of traffic by which they were unduly prejudiced.

Therefore, in order to derive damages based on the same degree of certainty required in a court of law, *Phillips Petroleum Co.* v. *Panhandle & S.F. Ry. Co.*, 315 I.C.C. 378, 380 (1961), we make the following observations and determinations with respect to the complainants' evidence

of market share, lost revenues, and the purported costs of handling the diverted traffic.

We agree in part with BAR that complainants' calculation of the number of lost carloads, on the basis of their percentage share of traffic handled in 1969, denotes nothing more than a rough approximation upon which to base their claim of diversion for subsequent years. The fallacy in this one-year approach is that it assumes that MEC's percentage share of the traffic coming or going over the BAR would remain constant during the 1970-1974 period. Thus, the projection of traffic for a 5-year period on the basis of only one year is purely speculative. As BAR has pointed out, MEC has failed to show its percentage share of the traffic coming or going over the BAR for any year other than 1969. The only evidence introduced by MEC to support its use of 1969 as a base year is the statement that its 1968 percentage share of BAR originated paper traffic subject to diversion was 67 percent, closely comparable to the 1969 paper traffic of 69 percent. This statement by itself does not support the use of 69 percent as the percentage share of paper traffic it would be expected to enjoy for subsequent years. In addition, the comparison of paper traffic subject to diversion for these two years (1968 and 1969) does not prove that a constant relationship exists for the other commodities subject to diversion for the same two years. More than one or two years are needed to establish MEC's market share of traffic in each of the commodities for which damages are claimed.

Since the determination of a reliable market share is necessary under the circumstances in order to calculate for damage purposes the amount of traffic by which MEC and B&M was unduly prejudiced, the Commission has used the available evidence in the record and the applicable data contained in the individual railroad's annual Quarterly Commodity Statistics (QCS) reports to develop MEC and

B&M market shares prior to 1970 for the commodities of paper, frozen vegetables, and starch. The historical market shares of MEC and B&M, based on statistics from five or more years prior to the BAR-CP agreement, were then projected for the 1970-1974 period by trend or average. (See Appendix D). In this manner, a more reasonably certain calculation of the number of outbound cars which were purportedly diverted by reason of the extraordinary actions of BAR and CP can be determined by (1) referencing the projected market share to the number of cars by commodity which were originated by BAR, absent CP, MEC, and B&M terminations, and (2) subtracting the actual number of cars handled by MEC and B&M. This same procedure was similarly followed with respect to inbound traffic.

There is no data in the QCS reports or evidence in the record, other than the 1969 annual market share, from which to develop reliably the pre-1969 market share of clay traffic. Although the QCS reports do present the MEC's clay carloads received from connections and, in turn, delivered to connections, there is no accurate way of determining what portion of these carloads interchanged with BAR.

It is likewise impossible to determine MEC's pre-1969 historical market share with respect to woodpulp traffic. Although it is possible to determine MEC's overhead shipments for the years 1965-1969, any determinations as to the pool of divertable traffic would be unreliable and inaccurate.

As previously noted, more than one or two years are needed to establish the applicable market share for the determination of a reasonably certain claim of damages. Therefore, where complainants' evidence with respect to damages is too uncertain and speculative to afford a sufficient basis for subsequent calculations, an award of

damages will be, and is hereby, denied for the commodities of clay and woodpulp. See *Grangers Mfg. Co.* v. *N.Y.C.R.R. Co.*, 120 I.C.C. 648, 652 (1927).

As to complainants' evidence with respect to lost revenues, MEC and B&M calculated their lost revenues on the diverted traffic by multiplying the number of alleged carloads of diverted traffic (broken down by commodity) by their resepctive annual average overhead revenues per car each claims it would have earned had the traffic not been diverted. The per car revenues represent the average revenues from BAR forwarded or received traffic following the year 1969 in which MEC and B&M participated. These average annual overhead revenues per car for the years 1970 through 1974 were determined for each involved commodity from a special MEC Market Study Report. The report was derived from abstracts of MEC settlement sheets with other carriers. B&M obtained both its average revenues per car and its percentage share of BAR overhead traffic handled jointly by B&M and MEC from this report.

We believe that complainants' calculation of an average revenue per car for each involved commodity is a valid approach in determining the lost revenues. There is no cause to believe that the actual proceeds and divisions on the diverted traffic, had it been routed via the MEC/B&M, would be any different from the average revenues per car on movements that were actually routed via the MEC/B&M during the 1970-1974 period. Thus, assuming that the average revenues per car were properly calculated, and we have no reason to believe otherwise, complainants' lost revenues on the diverted carloads are acceptable when calculated on the projected market shares as previously determined.

Finally, in computing their net damage claims, MEC and B&M calculated what it would have cost them to handle

the specific commodity traffic had it not been diverted. The costs comprised three items, namely: (1) per diem and mileage costs, (2) gross ton-mile costs, and (3) so-called "Rigby" costs.

Although not specifically excepted to by BAR or CP, our examination of complainants' costing procedures reveal a number of deficiencies which render their costs of little probative value in determining net damages. Complainants' costs were computed on the basis of MEC's percentage share of the available BAR originated or terminated traffic which we previously found to be unreliable. Aside from this, however, the overall procedures employed by complainants in estimating the cost of handling the so-called diverted traffic are improper.

MEC's calculation of per diem and mileage costs, on the basis of cars considered as "typical" in handling the diverted traffic, is acceptable under the circumstances. It is logical to assume that the same types of cars would handle the diverted traffic during 1970-1974 as in 1969. Nonetheless, the questionable aspect of these calculations is that in applying the per diem and mileage rates, it was assumed that all cars moved between MEC's Northern Maine Junction to Rigby Yard at Portland, Maine. MEC previously recognized that not all the cars necessarily moved between these two points, citing both the Yarmouth Junction connecting with the Canadian National Railroad and the St. Johnsbury, Vermont connection with Canadian Pacific. Yet MEC failed to give consideration to these other yards in calculating its per diem and mileage costs. Additionally, MEC did not show any of its per diem and mileage calculations. Only the end results were shown for the respective years 1970-1974 by commodity.

Furthermore, MEC's calculation of gross ton-mile cost is totally unacceptable. MEC has merely taken from its annual report, for the years 1970 through 1974, its (1)

maintenance of way and structure expenses (excluding depreciation) (2) locomotive maintenance expenses, (3) fuel expenses, and (4) train supplies and expenses. These expenses were in turn divided by the railroads' gross ton-miles for the respective years to arrive at a gross ton-mile cost for the above four categories of expenses.

This calculation of gross ton-mile cost by MEC is in sharp contrast to acceptable cost finding procedures such as those employed in the Commission's Rail Form A Statement 1F1-73, *Formula for use in Determining Rail Freight Service Costs.* The mere division of certain expenses by gross ton-miles denotes only a very rough approximation of a carrier's gross ton-mile cost.

The proper calculation of any service unit cost, therefore, involves the allocation of expenses to certain service categories and the division of these expenses by their related service units. In the case of gross ton-mile cost, not all of the above expenses shown by MEC are directly related to gross ton-miles. For example, only a portion of Account 402-Train Supplies and Expenses is related to line-haul cost. This portion (commonly referred to as the running expense portion) is normally related to car-miles and not gross ton-miles. Moreover, MEC has completely ignored many items of expenses properly includable in the gross ton-mile cost. For example, with the exception of Account 394-Train Fuel and Account 402-Train Supplies and Expenses, MEC has left out the remaining Transportation Expense Accounts from its annual report.

Additionally, MEC has not adequately explained why it arbitrarily reduced the maintenance of way and structure expenses by 75 percent and the locomotive maintenance cost by 50 percent. The reason given by MEC that the diverted traffic represents only a small increment of MEC's total traffic is vague and insufficient support for reducing these expenses. It should also be noted that under proper

costing procedures, all expenses of each railroad are distributed among the various service categories regardless of the amount of traffic being costed.

Based on the foregoing reasons, MEC has understated its gross ton-mile portion of the cost of handling the diverted traffic. MEC would be correct in using either the Commission's Rail Form A territorial average gross ton-mile costs from the Commission's territorial average cost studies, (New England — Region I) for the respective years 1970-1974, or preferably it could have developed system average gross ton-mile cost through an application of Rail Form A to its own expenses and statistics for the respective years involved. In lieu of either of these methods it could have used any system which follows sound cost-finding principles and procedures to calculate the appropriate service unit costs.

MEC's inclusion of so-called "Rigby Costs" in its calculations is also unreliable. The only explanation as to what these costs represent is that they include all the expenses of operating the Rigby Yard at Portland, Maine. Rigby Yard is an interchange facility between the Boston and Maine and the Maine Central at Portland, Maine. Presumably, these costs are synonymous with interchange costs for handling cars between the MEC and the B&M at Portland, Maine. Other than to state that the Rigby-Costs consist of maintenance expenses, taxes, crew and superintendent wages, MEC has failed to explain how these costs were developed.

Thus, we are unable to determine what is meant by MEC's cost witness' statement that "it included ten percent of the amount of the Rigby Count for each car going through; this is the basis of the Rigby count multiplied by the number of cars." It appears that the witness is saying that only 10 percent of the so-called "Rigby cost" is applicable to the involved traffic. If this is the case, then

we would question what appears to be an arbitrary assignment of expenses.

It is evident that MEC has seriously understated the costs associated with the diverted traffic. Not only has MEC left out certain items of line-haul expenses, but it has arbitrarily reduced the expenses that were considered. MEC has also failed to mention or consider switching expenses incurred at Northern Maine Junction in connection with cars received from or delivered to the BAR. Although the diverted traffic does not originate or terminate on the MEC, certain so-called terminal expenses would be incurred on this traffic, such as station clerical cost and special service cost, which were not included by MEC.

Although we have restricted our comments to MEC's cost calculations, the same comments are applicable to B&M's cost showing since B&M followed the same procedures as MEC.

In conclusion, complainants' costing procedures for calculating net damages are clearly deficient. However, to suggest that complainants trace each and every car going over or coming through Brownville Junction during 1970-1974 in order to determine the actual cost of service it would have incurred had it been routed by the MEC/B&M, is also impractical. A simpler and more reliable method, therefore, is to apply each carrier's annual operating ratio against each carrier's revenues for the respective years 1970-1974 to arrive at the net damages owed MEC and B&M. The use of the carriers' operating ratios would have the effect of imputing each carrier's average cost to the affected traffic. In view of the circumstances surrounding this particular proceeding, specifically the deficiency of complainants' costs and the absence of anything more appropriate, the use of the carriers' operating ratios is a reasonably certain approach in assessing the damages on all

traffic diverted pursuant to the agreement and practices thereto.

Utilizing the statistics we have developed on MEC and B&M's expected market share, absent the agreement, and the average revenues per car and the individual carrier's operating ratio, the net damages to which MEC and B&M are entitled have been recalculated for paper, frozen food, and starch commodities during the 1970-1974 period.

After calculating the number of cars potentially lost by MEC on paper traffic during 1970-1974 (See Appendix E), the recalculated net damage suffered by MEC with respect to paper traffic during the 5-year period is $153,748. (See Appendix F). The recalculated net damage suffered by B&M with respect to paper traffic during 1970-1974 is $72,433. (See Appendix G).

MEC's damages with respect to frozen food traffic during the same period is $14,371. (See Appendix H). B&M makes no claim of lost traffic on frozen food. MEC's and B&M's damages with respect to starch traffic is $8,204 and $14,484, respectively. (See Appendices I and J). The summary of net damages suffered by MEC and B&M on all applicable commodities is contained in Appendix K.

Finally, the Administrative Law Judge awarded MEC its estimated cost of solicitation allegedly incurred to counter the BAR-CP division efforts. MEC calculated its net damages with respect to solicitation costs by using 1969 as a base year, and subtracting its 1969 solicitation costs from the subsequent annual costs during the period 1970-1974. The amount of damages requested, and awarded by the Administrative Law Judge, was $32,300. In its exceptions, BAR contends that MEC did not suffer any losses regarding solicitation since MEC conducted its counter-solicitation by reassigning men to different territories, and hence did not incur any extra expenses.

We find, contrary to the decision of the Administrative Law Judge, that the solicitation expenses requested by BAR are too uncertain and speculative for an award of damages. In addition to the unreliable use of one year as a basis for its average annual solicitation costs, MEC also disregards the fact that business decisions which determine the amount of solicitation required by any particular railroad or corporation are varied, and cannot be reasonably or accurately allocated to one specific purpose. Therefore, we hereby deny MEC their claim for damages with respect to solicitation expenses.

ULTIMATE CONCLUSION AND FINDINGS

We find that BAR, aided by CP, unduly prejudiced MEC and B&M in the distribution of traffic in violation of section 3(4) of the act; that in consequence of such violation MEC and B&M were injured during the 5-year period 1970-1974; that MEC is entitled to damages of $40,065, $59,029, $37,243, $16,349, and $23,637 for the period 1970-1974, respectively, with simple interest at 4 percent per annum; and that B&M is entitled to damages of $26,205, $28,952, $18,142, $2,166, and $11,452 for the period 1970-1974, respectively, with simple interest at 4 percent per annum.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

COMMISSIONER MURPHY, concurring in part and dissenting in part:

I am in agreement with the majority to the extent that it finds that defendants were in violation of the Act and enters a cease and desist order. I cannot, however, agree with the disposition of the request for damages.

Both the hearing officer and the majority rely on or seek to distinguish *Atlantic Coast Line R. Co.* v. *Baltimore & O. R. Co.*, 12 F. Supp. 711 (1935), and *Thompson* v. *St. Louis - San Francisco Railway Company*, 218 F.2d 166 (1955). My review of the matter indicates that those proceedings involved actions instituted initially in a court of law and related to a dispute involving divisions of rates.

In my opinion, the first order of business should be to determine whether or not the Commission can or should consider a complaint for reparations between carriers involving matters other than divisions of joint rates. In this respect, the Commission's decision in *Manufacturers Ry. Co.* v. *St. Louis, I.M. & S. Ry. Co.*, 21 I.C.C. 304; 28 I.C.C. 93, 32 I.C.C. 100; and *Manufacturers' Ry. Co.* v. *United States*, 246 U.S. 457, appears to provide the proper landmark. For example, in the supplemental report therein, 28 I.C.C. 93, at page 107, the Commission stated:

> * * * Upon what theory it as a common carrier can at the same time be a shipper or as a common carrier can claim reparation from another common carrier we are not advised. Neither are we definitely advised whether the brewing association as a shipper and the independent shippers on its line intend to make similar claims. It is manifest that any claim for reparation must come from the shipper who pays the rate and that the order must run against each carrier in the route, one of which is the railway. We can conceive of no circumstances under which this Commission could award reparation against the trunk lines to the Manufacturers Railway as a common carrier. Even in case of joint rates a failure by the trunk lines to abide by a subsequent order of the Commission fixing divisions would be punishable by proceedings for penalties and forfeitures imposed by the act for disobedience of the Commission's orders and would not afford the

basis for a claim by the railway for reparation, an award of which under the act is due only from a carrier to a shipper and not to one carrier, as a carrier, from another.

While the Transportation Act of 1920 did make substantial changes in the jurisdiction of this Commission, there appears to be no change in the statute with respect to authorizing the Commission to grant reparation in actions between carriers. It is true that under Section 15(6) of the Act the Commission is authorized to make a readjustment to the time of the filing of the complaint. A retroactive adjustment can only be made in those instances where there has been a prescription of joint rates in the past. See the majority's opinion in *Official — Southern Divisions*, 337 I.C.C. 74, 84.

The majority, in granting relief to complainants, has readjusted the basis for the award or reparation essentially through the use of a statistical approach. However, even if the Commission can or should grant reparation in the circumstances under consideration the award of damages by the majority appears to be based upon deficient grounds. This is not a Section 1 complaint in which damages can be awarded on the basis of the differences between the assailed rates charged and those sought. In a Section 2 or 3 proceeding, proof of damages suffered must be more exacting. I find nothing in the record to support such a basis and the majority's reliance upon a statistical approach to determine the measure of damages appears to be deficient.

In summary, while I am in agreement with the majority with respect to a finding of undue prejudice to complainants and the entry of a cease and desist order, I cannot agree with the award of damages herein. In that respect I would leave complainants to other remedies, perhaps before the courts.

COMMISSIONER CHRISTIAN, whom COMMISSIONER O'NEAL joins, concurring:

I am in complete agreement with the decision of the majority except to the extent that they construe the decisions of the courts in *Thompson* v. *St. Louis - San Francisco Ry., supra*, and *Atlantic Coast Line R.R. Co.* v. *Baltimore & Ohio R.R. Co., supra*, as holding that section 16(3)(b) applies only to suits between shippers and carriers and then conclude that "the courts' construction of section 16(3)(b) was improperly decided." After carefully analyzing those decisions, I am convinced that in fact neither *Thompson* nor *Atlantic Coast Line* is directly in point on this issue.

Thompson did not involve section 16(3)(b) at all. Rather, that case involved the applicability of sections 16(3)(a) and 16(3)(e) to the dispute at issue. Since section 16(3)(b) uses entirely different language than either 16(3)(a) or 16(3)(e), the *Thompson* court's conclusion that 16(3)(a) and 16(3)(e) are limited to suits between shippers and carriers is in no way controlling as to the applicability of the entirely separate and different provisions of section 16(3)(b).

As to *Atlantic Coast Line*, the court there expressly found that "This suit is not one for 'damages' and counsel for both parties so agree." Since section 16(3)(b) by its terms applies only to complaints "for the recovery of damages not based on overcharges", this factual finding plainly takes the case outside that section and any further comments concerning the possible interpretation of section 16(3)(b) are no more than *dicta*. As far as I have been able to ascertain, no other decisions have addressed the applicability of section 16(3)(b) to actions between carriers, and I would have treated the issue as one of first impression. As such, I agree with both the rationale and the conclusions expressed by the majority.

It is ordered, That Bangor and Aroostook Railroad Company be, and it is hereby, notified and required to cease and desist and thereafter abstain from unlawful preferential solicitation and exercise of its discretion in the distribution of traffic in violation of section 3(4) of the Interstate Commerce Act;

It is further ordered, That CP Rail, Canadian Pacific Limited, be, and it is hereby, notified and required to cease and desist and thereafter abstain from aiding Bangor and Aroostook Railroad Company, in the violation of section 3(4) of the Interstate Commerce Act;

It is further ordered, That Bangor and Aroostook Railroad be, and it is hereby, authorized and directed to pay damages of $176,323 to Maine Central Railroad Company and $86,917 to Boston and Maine Corporation, Robert W. Meserve, Benjamin H. Lacy, Trustee, plus interest as described in the findings;

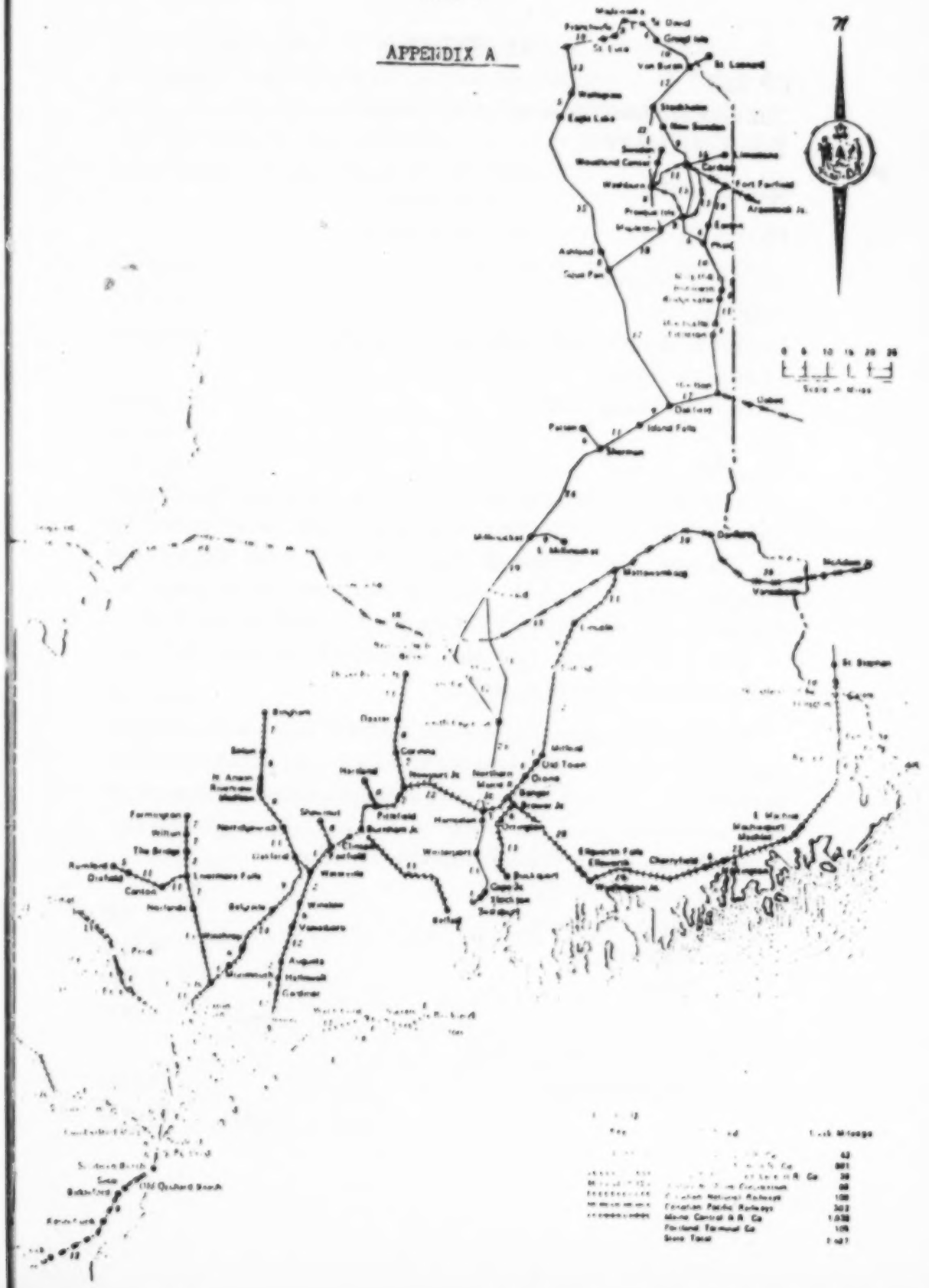
And it is further ordered, That the effective date of this order shall be 30 days from the date of service hereof.

By the Commission.

ROBERT L. OSWALD
Secretary

(SEAL)

APPENDIX A



APPENDIX B

CP Rail
Windsor Station, Montreal 101, Quebec
Tel. (514) 861-6811

July 15, 1970.

PRIVATE

Mr. W. J. Strout,
President
Bangor and Aroostook Railroad Company,
84 Harlow Street,
BANGOR, Maine 04401.

Dear Mr. Strout:

I refer to your letter to me dated June 3 and my reply dated June 5, 1970, regarding the additional traffic to be routed by the Bangor and Aroostook Railroad (BAR) via Brownville Junction, Maine, and the per car payments to be made by Canadian Pacific Railway Company (CP Rail) to the BAR.

This will confirm that the agreement between the two railroad companies is as follows:

1. The BAR agrees to interline with CP Rail via Brownville Junction as many cars of paper products and potatoes as it is possible for it so to interline and anticipates that by reason of this agreement such interline traffic will be increased by approximately 24,000 cars annually as follows:

Forwarded to CP Rail	
Paper products	11,000
Potatoes	4,500
Other	3,500
Sub-Total:	19,000
Received from CP Rail	
Miscellaneous	5,000
Total:	24,000

2. CP Rail agrees to pay to the BAR a car allowance in accordance with the scale set out in Column 2 of Table A below on each car of paper products or potatoes interlined with CP Rail in any calendar year after the calendar year 1969, subject to conditions set out below.

TABLE A

Paper Products

Column 1 Off Line Junctions	Column 2 Scale of Car Allowance ($)	Column 3 Base Traffic (Carloads)
Wells River, Vt.	5.00	150
Delson/Adirondack, P.Q.	17.00	1,135
Windsor, Ont.	25.00	290
Detroit, Mich.	45.00	2,615
Hamilton, Ont.	50.00	450
St. Thomas, Ont.	50.00	30
Total:		4,670

Potatoes

Off Line Junctions	Car Allowance ($)	Base Traffic (Carloads)
Wells River, Vt.	4.00	Nil
Delson/Adirondack, P.Q.	7.00	43
Detroit/Hamilton/ Windsor	23.00	1,398
Total:		1,441

Payment of the above car allowances will be subject to the following conditions:

(1) Subject to conditions two and three below, payments will be made on cars destined to individual off line junctions specified in Column 1 of Table A above, after the number of carloads indicated in Column 3 (base traffic) has been received by CP Rail.

(2) Payment will be made on each carload of paper products CP Rail receives in excess of 4,670 carloads in any calendar year.

(3) Payment will be made on each carload of potatoes CP Rail receives in excess of 1,441 carloads in any calendar year.

Car allowance payments will be adjusted in accordance with future Ex Parte freight rate increases subsequent to Ex Parte 265 series for traffic in respect of which car allowance payments are to be made pursuant to Item 2 hereof.

Car allowance payments will be made by CP Rail quarterly by cheque through the Claims Section of the Auditor of Freight Claims.

The implementation of this agreement shall be subject to such approvals as may now or hereafter be required by State and Federal laws of the United States.

3. CP Rail and the BAR agree to the following joint use of and additions to physical interchange facilities at Brownville Junction, to ensure the most reliable year-round service possible:

CP Rail agrees to provide additional interchange tracks Nos. 3 and 4 to supplement the three tracks now designated to handle BAR traffic. The BAR is authorized to make use of CP Rail's turntable, when conditions make it necessary to turn snowplows and engines. The BAR agrees to run its units back-to-back in normal train operation to avoid having to break them apart to turn same on the turntable. This arrangement will remain in effect until such time as a new wye is built at Brownville Jct.

CP Rail agrees to construct a new wye, the south leg of which will connect with the BAR's track between Van Horne Avenue and the southerly switch leading to the interchange track as indicated on the two Brownville Yard plans attached. The BAR authorizes CP Rail to install the south wye switch just north of Van Horne Avenue. The BAR further authorizes CP Rail to use approximately 4,000 (four thousand) feet of its

main track south of Van Horne Avenue for a wye tail track and switching purposes.

CP Rail agrees to establish radio communication between incoming trains and yard office at Brownville Jct., by adding BAR frequency 160.440 to CP Rail's base station at Brownville Jct. A new system will be provided to improve communication and increase range which will include provision for four channels and monitoring arrangements. The BAR agrees to pay 50% of the capital cost of these facilities.

This agreement shall take effect as of January 1, 1970, and shall continue in force for a term of fifteen years provided, however, that it may be reopened by either party for further negotiations at the end of five years (January 1, 1975) and at the end of ten years (January 1, 1980) by giving to the other party at least one hundred and eighty (180) days' written notice. The agreement will continue after the formal expiration date until either one or both parties give one hundred and eighty (180) days' notice of termination in writing.

Would you kindly sign and return the attached copy to me to confirm the acceptance by BAR of this agreement.

Yours very truly,

Accepted on behalf of Bangor
and Aroostook Railroad Company

Vice President

APPENDIX C

Maine Central Participation in BAR Traffic Subject to Diversion

	1969	1970	1971	1972	1973	1974
Paper Products (outbound)	69.0%	55.3%	53.1%	54.9%	61.1%	60.3%
Frozen Foods (outbound)	88.7%	83.9%	68.4%	65.1%	80.1%	75.9%
Woodpulp (inbound)	74.0%	46.6%	30.8%	32.6%	25.0%	23.5%
Clay (inbound)	79.7%	81.8%	46.3%	38.2%	79.9%	81.0%
Starch (inbound)	86.8%	77.9%	50.0%	34.8%	93.8%	54.8%

APPENDIX D

Market Share Analysis of Paper, Frozen Vegetables, and Starch Traffic for MEC and B&M

Paper

Using the annual QCS statistics, exhibit 111-H of MEC is supplemented by computing MEC's market share of paper traffic from BAR for the available years prior to 1969. The following historical market shares are computed. (1964 data not available).

Year	MEC Market Share (percentile)
1962	80.3
1963	80.5
1965	73.0
1966	76.1
1967	75.5
1968	73.8
1969	70.5

A decreasing market share of MEC carloadings of paper from BAR is clearly indicated. The projected market share of MEC is then calculated for the period 1970-1974.

Year	Forecasted MEC Market Share (percentile)
1970	69.9
1971	68.4
1972	67.0
1973	65.5
1974	64.1

The above data is used to compute the potential market share of paper traffic that MEC would have obtained absent the BAR-CP agreement and practices thereto. It is a more

reliable calculation than the constant 69 percent market share used by MEC for the period 1970-1974 in determining the amount of traffic by which MEC was subsequently unduly prejudiced.

The historical market shares of the B&M in its participation in BAR originated paper shipments is impossible to determine from data contained in the record or in the QCS reports. Absent any precise way to estimate B&M's historical share, yet recognizing that MEC's damage computations have been adjusted downward, it is reasonable under the circumstances to decrease B&M's number of lost carloads by the relative overstatement of the MEC lost carloads. Since most MEC lost carloads of paper traffic are also lost by the B&M, this approximation is valid in order to determine B&M's potential market share. Hence, if calculations show that MEC lost carloads are 5.5 percent overstated in 1970, based on our projected market share, the B&M alleged carload losses are similarly decreased by the same relative 5.5 percent.

Frozen Vegetables

Pre 1969 analysis of MEC's market share of frozen vegetable traffic shows no discernable trend. It is more reliable, therefore, to use a six year average of market shares, 1964-1969, rather than MEC's use of one year, to project the expected market share during the period 1970-1974. The six year average (1964-1969) is 85.2 percent as compared to MEC's use of the 1969 market share of 88.7 percent. 85.2 percent is then used as the projected historical market share during the period 1970-1974. B&M does not make any damage requests for diverted carloads of frozen vegetables.

Year	MEC Market Share (percentile)
1964	76.9
1965	87.2

1966	85.7
1967	86.3
1968	86.6
1969	88.7
1970	85.2
⎮	⎮
1974	85.2

Starch

Analysis of MEC's pre-1969 share of carloadings of starch delivered to BAR indicates no noticeable trend. As in the case of frozen vegetables, the historical market share data from 1965 to 1969 is averaged to develop a more reliable approximation of MEC's expected market share during the period 1970-1974. The averaged expected market share is 84.8 percent as compared to MEC's use of 86.8 percent. This adjusted market share used to recalculate MEC lost carloads.

Year	MEC Market Share (percentile)
1965	78.8
1966	66.4
1967	96.6
1968	95.4
1969	86.8
1970	84.8
⎮	⎮
1974	84.8

The B&M pre-1969 market share of starch traffic cannot be precisely calculated with available statistics. But, as in the case of diverted paper traffic, it is reasonable to adjust B&M lost carloads by the relative percentage overstatement of the MEC lost carload compulation based on our projected historical average market share. This adjusted market share is then used to recalculate B&M lost carloads.

APPENDIX E

Recalculation of the Number of Carloads of Paper Traffic Loss Based on the Bureau of Economics' Estimate of the Percent Number of Carloads MEC Could Expect to Handle During 1970-1974

	No. of Cars 1970	No. of Cars 1971	No. of Cars 1972	No. of Cars 1973	No. of Cars 1974
1. Newsprint	5,048	4,572	4,313	4,362	4,300
2. Groundwood	12,145	10,998	8,539	9,314	9,483
3. Printing	*	*	5,056	6,177	6,930
4. Total	17,193	15,570	17,908	19,853	20,713
5. Potential Paper Traffic (excludes CP, MEC & B&M terminated traffic)	15,347	13,528	15,412	17,273	18,017
6. Percent of Paper Traffic MEC would be expected to handle[1]	69.9	68.4	67.0	65.5	64.1
7. Customary Paper Traffic (Line 5 x Line 6)	10,728	9,253	10,326	11,313	11,549
8. Overhead Paper Traffic Actually Handled by MEC	8,486	7,190	8,459	10,555	10,858
9. Number of Cars Lost (Line 7 - Line 8)	2,242	2,063	1,867	759	691

* During years 1969-71, printing was not reported separately in BAR's Quarterly Commodity Statistics, and was included in the groundwood totals.

[1] Based on MEC's "historical market share" as developed by the Bureau of Economics.

RESTATEMENT OF MEC'S DAMAGES ON PAPER TRAFFIC FOR THE YEARS 1970-1974, BASED ON THE BUREAU OF ECONOMICS' ESTIMATE OF MEC'S MARKET SHARE USING MEC'S AVERAGE OVERHEAD REVENUES PER CAR AND OPERATING RATIOS FOR THE RESPECTIVE YEARS

(Figures Rounded to Nearest Whole Dollar)

	A	B	C	D	E	F	G
	Breakdown of Paper Traffic[1]	No. of Cars Diverted	MEC Overhead[1] Average Revenue Per Car	MEC Revenue Loss	MEC Operating Ratio[2]	MEC Expenses	Amount of Damages
	(Percent)			(col.B x Col.C)	(Percent)	(Col.D x Col.E)	(Col.D - Col.F)
			1970				
Newsprint	33.1	742	$ 158	$117,236	86.5	$101,409	$ 15,827
Groundwood	37.5	841	116	97,556	86.5	84,386	13,170
Printing	29.4	659	117	77,103	86.5	66,694	10,409
		2,242	TOTAL	$291,895		$252,489	$ 39,406
			1971				
Newsprint	34.4	710	$ 192	$136,320	83.5	$113,827	$ 22,493
Groundwood	36.6	755	119	89,845	83.5	75,021	14,824
Printing	29.0	598	138	82,524	83.5	68,907	13,617
		2,063	TOTAL	$308,689		$257,755	$ 50,934
			1972				
Newsprint	29.0	541	$ 200	$108,200	89.4	$ 96,731	$ 11,469
Groundwood	40.7	760	124	94,240	89.4	84,251	9,989
Printing	30.3	566	137	77,542	89.4	69,323	8,219
		1,867	TOTAL	$279,982		$250,305	$ 29,677
			1973				
Newsprint	24.9	189	$ 198	$37,422	86.9	$ 32,520	$ 4,902
Groundwood	41.6	316	131	41,396	86.9	35,973	5,423
Printing	33.5	254	150	38,100	86.9	33,109	4,991
		759	TOTAL	$116,918		$101,602	$ 15,316
			1974				
Newsprint	24.4	169	$ 228	$ 38,532	85.4	$ 32,906	$ 5,626
Groundwood	40.6	280	159	44,520	85.4	38,020	6,500
Printing	35.0	242	178	43,076	85.4	36,787	6,289
		691	TOTAL	$126,128		$107,713	$ 18,415
			GRAND TOTAL AMOUNT OF DAMAGES				$153,748

[1] MEC Market Study Report

[2] Operating Ratios derived from carrier's annual

APPENDIX G

RESTATEMENT OF B&M'S DAMAGES ON PAPER TRAFFIC FOR THE YEARS 1970, 1971, 1972, and 1974,[1] BASED ON THE SAME RELATIVE PERCENTAGE OVERSTATEMENT OF DAMAGES ON PAPER TRAFFIC USING B&M'S AVERAGE OVERHEAD REVENUES PER CAR AND OPERATING RATIOS FOR THE RESPECTIVE YEARS

(Figures Rounded to Nearest Whole Dollar)

	A	B	C	D	E	F	G
	Breakdown of Traffic[2]	No. of Loss Cars	B&M Overhead Average Revenue Per Car[3]	B&M Loss Revenue	B&M Operating Ratio	B&M Expenses	Amount of Damages
				(col.B x Col.C)	(Percent)[4]	(Col.D x Col.E)	(Col.D - Col.F)
			1970				
Newsprint	35.0	431	$ 219	$ 94,389	88.9	$ 83,912	$ 10,477
Groundwood	40.0	492	159	78,228	88.9	68,656	9,572
Printing	25.0	308	171	52,668	88.9	46,822	5,846
Total		1,230		$225,285		$199,390	$ 25,895
			1971				
Newsprint	32.6	299	$ 220	$ 65,780	84.8	$ 55,781	$ 9,999
Groundwood	43.0	394	175	68,950	84.8	58,470	10,480
Printing	24.4	224	186	41,664	84.8	35,331	6,333
Total		917		$176,394		$149,582	$ 26,812
			1972				
Newsprint	28.3	205	$ 213	$ 43,665	89.6	$ 39,124	$ 4,541
Groundwood	45.3	327	193	63,111	89.6	56,547	6,564
Printing	26.4	191	189	36,099	89.6	32,345	3,754
Total		723		$142,875		$128,016	$ 14,859
			1974				
Newsprint	24.9	33	$ 228	$ 7,524	83.7	$ 6,298	$ 1,226
Groundwood	45.7	61	214	13,054	83.7	10,926	2,128
Printing	29.4	40	232	9,280	83.7	7,767	1,513
Total		134		$ 29,858		$ 24,991	$ 4,867
GRAND TOTAL AMOUNT OF DAMAGES							$ 72,433

[1] No damages claimed for 1973
[2] MEC Market Study Report.
[3] 1970-72, B&M Manager Revenue-Traffic Revenue Study.
1973-74, B&M Manager Revenue (7 Digit Commodity Printout).
[4] Operating ratios derived from carrier's annual reports for the respective years.

APPENDIX H

RESTATEMENT OF MEC'S DAMAGES ON FROZEN FOODS (STCC CODE 2037 & 2038) FOR THE YEARS 1970-1974 BASED ON THE BUREAU OF ECONOMICS' ESTIMATE OF MEC'S MARKET SHARE USING MEC'S AVERAGE OVERHEAD REVENUES PER CAR AND OPERATING RATIOS FOR THE RESPECTIVE YEARS

(Figures Rounded to Nearest Whole Dollar)

	A	B	C	D	E	F	G	H	I	J
Year	Cars Forward'd by Bar	MEC Potential Traffic	MEC Overhead Traffic Handled	Customary for MEC 85.2%[1]	MEC Loss in Cars	MEC Average Overhead Revenue Per Car[2]	MEC Revenue Loss	MEC Operating Ratios[3]	MEC Expenses	Amount of Damages
				(Col. B x 85.2%)	(Col. D-Col. C)		(Col. E x Col. F)	(Percent)	(Col. G x Col H)	(Col. G - Col. I)
1970	2,307	1,792	1,503	1,526	23	$117	$ 2,691	86.5	$ 2,328	$ 363
1971	2,343	1,789	1,223	1,524	301	127	38,227	83.5	31,920	6,307
1972	2,180	1,652	1,076	1,408	332	138	45,816	89.4	40,960	4,856
1973	1,440	1,143	916	974	58	136	7,888	86.9	6,855	1,033
1974	1,289	911	691	776	85	146	12,410	85.4	10,598	1,812
						TOTAL	$107,032		$92,661	$14,371

[1] Based upon average Market Share for six-year period, 1964-1969
[2] MEC Market Study Report
[3] Operating Ratios derived from carrier's annual reports for respective years.

APPENDIX I

RESTATEMENT OF MEC'S DAMAGES ON STARCH TRAFFIC (STCC 204662 & 204621) FOR THE YEARS 1970-1074 BASED ON THE BUREAU OF ECONOMICS' ESTIMATE OF MEC'S CUSTOMARY SHARE, USING MEC'S AVERAGE OVERHEAD REVENUES PER CAR AND OPERATING RATIOS FOR THE RESPECTIVE YEARS

(Figures Rounded to Nearest Whole Dollar)

	A	B	C	D	E	F	G	H	I
Year	Cars Received by BAR	MEC Overhead Traffic Handled	Customary For MEC 84.8%[1] (Col. A x 84.8%)	MEC Loss or Gain In Cars (Col. C - Col. B)	Average Overhead Revenue Per Car[2]	MEC Lost Revenue (Col. D x Col. E)	MEC Operating Ratios[3] (Percent)	MEC Expenses (Col. F x Col. G)	Amount of Damages (Col. F - Col. H)
1970	253	197	215	18	$122	$ 2,196	86.5	$ 1,900	$ 296
1971	242	121	205	84	129	10,836	83.5	9,048	1,788
1972	333	116	282	166	154	25,564	89.4	22,854	2,710
1973	276	259	234	(25)	164	--	86.9	--	--
1974	403	221	342	121	193	23,353	85.4	19,943	3,410
					TOTAL	$61,949		$53,745	$8,204

[1] Based upon average Market Share for the six-year period, 1964-1969
[2] MEC's Market Study Report
[3] Operating Ratios derived from carrier's annual reports for respective years

APPENDIX J

RESTATEMENT OF B&M'S DAMAGES ON STARCH TRAFFIC FOR THE YEARS 1970-1974 BASED ON THE SAME RELATIVE PERCENTAGE OVERSTATEMENT OF DAMAGES ON STARCH TRAFFIC USING B&M'S AVERAGE OVERHEAD REVENUES PER CAR AND OPERATING RATIOS FOR THE RESPECTIVE YEARS

(Figures Rounded to Nearest Whole Dollar)

	A	B	C	D	E	F
Year	B&M's Corrected Loss In Car Movement Participation	B&M Average Overhead Revenue[2] Per Car Movement	B&M Loss Revenues	B&M's Operating Ratios[3] (Percent)	B&M's Expenses	Amount of Damages
1970	19	$147	$ 2,793	88.9	$ 2,483	$ 310
1971	88	160	14,080	84.8	11,940	2,140
1972	189	167	31,563	89.6	28,280	3,283
1973	92[1]	177	16,284	86.7	14,118	2,166
1974	(203)	199	40,397	83.7	33,812	6,585
		TOTAL	$105,117		$90,633	$14,484

[1] In 1973 there was no overstatement of MEC carloading losses on Starch, therefore 1973 B&M's lost starch carloadings would not change.
[2] 1970-72, B&M Manager Revenue-Traffic Revenue Study.
1973-74, B&M Manager Revenue (7 Digit Commodity Printout).
[3] Operating ratios derived from carrier's annual reports for the respective years.

APPENDIX K

SUMMARY OF NET DAMAGES SUFFERED BY MEC AND B&M BASED ON OUR RESTATEMENT OF THE DAMAGES UTILIZING STATISTICS ON EACH CARRIER'S EXPECTED MARKET SHARE AND EACH CARRIER'S OPERATING RATIOS FOR THE RESPECTIVE YEARS 1970-1974

Commodity	MEC's Net Damages	B&M's Net Damages
Paper	$153,748	$72,433
Frozen Food	14,371	[1]
Starch	8,204	14,484
Total	$176,323	$86,917

[1] B&M did not claim damages relating to frozen foods.

Supreme Court, U. S.
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No. 77-1847

In the Supreme Court of the United States

OCTOBER TERM, 1978

BANGOR AND AROOSTOOK RAILROAD CO. and CANADIAN PACIFIC LIMITED, PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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INDEX

Page

Opinions below 1

Jurisdiction 1

Questions presented 2

Statement 2

Argument 4

Conclusion 10

CITATIONS

Cases:

American Trucking Associations, Inc. v. *Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397 5

Berenyi v. *Immigration Director*, 385 U.S. 690 9

Bigelow v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 8

Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327 7

Greyhound Corp. v. *Mt. Hood Stages, Inc.*, No. 77-598, decided June 19, 1978 9

Hicks v. *Miranda*, 422 U.S. 332 5

Holmberg v. *Armbrecht*, 327 U.S. 392 9

McLean Trucking Co. v. *United States*, 321 U.S. 67 6

National Society of Professional Engineers v. *United States*, No. 76-1767, decided April 25, 1978 6

Page

Cases—continued:

Ohralik v. *Ohio State Bar Association*, No. 76-1650, decided May 30, 1978 ..... 6, 7

Southern Pacific Co. v. *United States*, 277 F. Supp. 671, affirmed, 390 U.S. 744 ..... 4, 5

Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U.S. 555 8

United States v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 ..... 6, 9

Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council*, 425 U.S. 748 7

Western Pacific Railroad Co. v. *United States*, 382 U.S. 237 5

Constitution and statute:

United States Constitution, First Amendment 6, 7, 8

Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1 *et seq.*:

Declaration of National Transportation Policy, preceding 49 U.S.C. 1 5

Section 3(4), 49 U.S.C. 3(4) 2, 4, 5, 6, 7

Section 8, 49 U.S.C. 8 8

Section 16(1), 49 U.S.C. 16(1) 2, 8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-37) is reported at 574 F. 2d 1096. The opinion of the court of appeals on petition for rehearing (Pet. App. A-40 to A-46) is not yet reported. The opinion of the Interstate Commerce Commission (Pet. App. A-50 to A-126) is reported at 356 I.C.C. 749.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-38 to A-39) was entered on March 30, 1978. A petition for rehearing was denied on May 12, 1978. The petition for a writ of certiorari was filed on June 28, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2350(a).

QUESTIONS PRESENTED

1. Whether the Commission's finding that petitioners violated 49 U.S.C. 3(4) by engaging in preferential solicitation and distribution of traffic to the undue prejudice of other carriers is supported by substantial evidence and consistent with the First Amendment.

2. Whether the Commission was authorized to assess damages for the violation of 49 U.S.C. 3(4).

STATEMENT

1. The Interstate Commerce Commission determined that petitioner Bangor and Aroostook Railroad Company (BAR), aided by petitioner Canadian Pacific Limited (CP), unduly prejudiced Maine Central Railroad Co. (MEC) and Boston and Maine Corporation (B&M) in the distribution of traffic, in violation of Section 3(4) of the Interstate Commerce Act (the Act), as amended, 54 Stat. 903, 49 U.S.C. 3(4).[1] The Commission ordered BAR to pay damages to MEC and B&M for its violations.[2] See Section 16(1) of the Act, as amended, 34 Stat. 590, 49 U.S.C. 16(1). The court of appeals affirmed the Commission's finding that petitioners had violated Section 3(4) and sustained the Commission's award of damages.[3]

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[1]Section 3(4) provides that carriers "shall not * * * unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper."

[2]MEC was awarded $176,323; B&M was awarded $86,917 (Pet. App. A-110).

[3]Having found that petitioners violated Section 3(4) the Commission also issued a cease and desist order (Pet. App. A-110). The court of appeals, while upholding the Commission's findings on liability and damages, concluded that the cease and desist order was too general (Pet. App. A-34 to A-37). The court remanded the case to allow the Commission to specify the conduct intended to be prohibited by the cease and desist order. On June 1, 1978, the Commission reopened the proceeding to comply with the court's mandate (Pet. App. A-48 to A-49).

2. BAR is an originating carrier, receiving goods directly from shippers and transporting them to destinations through interconnecting carriers. BAR connects in northeastern Maine with CP at Brownville Junction and with MEC at Northern Maine Junction (Pet. App. A-55). In November 1969 BAR initiated a traffic study to determine the extent to which traffic moving through the Northern Maine Junction could be rerouted to CP at the Brownville Junction. It also commenced negotiations with CP to implement a rerouting plan (*id.* at A-56 to A-58).[4] As a result of those negotiations, BAR agreed to supply CP with confidential data concerning traffic origination and termination on BAR lines, which CP used to solicit new traffic. A written agreement, executed in July 1970, confirmed BAR's intention to divert "as many cars of paper products and potatoes as * * * possible" (*id.* at A-62). CP also confirmed by letter its understanding that the diversion plan would be long-term in nature (*id.* at A-57 to A-61).[5]

BAR notified all sales personnel and all station agents that they should "start soliciting at once all traffic possible through Brownville Junction" (Pet. App. A-60). BAR also

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[4]The Commission concluded that it was unnecessary to ascertain BAR's motive for diverting the traffic (Pet. App. A-78). It found, however, that BAR and CP initiated the rerouting "without regard to the service considerations of each connecting line and with the knowledge that a substantial diversion of traffic would seriously harm both MEC and B&M." *Ibid.* In an internal memorandum, BAR estimated that MEC and B&M would lose $2,800,000 per year as a result of the diversion plan. (Pet. App. A-57). The record also shows that BAR had been considering a takeover of MEC, and certain evidence indicated that the diversion plan was intended to "weaken MEC financially" to "make a take-over easier" (*id.* at A-64).

[5]BAR anticipated that this traffic diversion plan could affect its revenues adversely. To mitigate that effect, BAR induced CP to pay it a "car allowance" for every car routed to CP at Brownville Junction that would result in a diminished rate of return for BAR (Pet. App. A-5, A-6).

forwarded routing guides to the principal shippers on its lines; these showed only routings by CP over the Brownville Junction (*id.* at A-61). CP's sales personnel added to the solicitation effort, and joint visits by BAR and CP representatives to shippers took place to intensify the solicitation (*ibid.*). Those personnel made representations to shippers about purported service advantages that would result from using the Brownville Junction, such as transit time, car supply, and reliability, without investigating or confirming the factual basis for such representations (*id.* at A-7 n. 7, A-11).[6]

The BAR diversion plan resulted in a substantial reduction of traffic shipped over MEC. The agreement remained in effect for five years, until the parties terminated it in the beginning of 1975 (Pet. App. A-7). The Commission concluded that this pattern of preferential treatment violated Section 3(4) of the Act. The court of appeals affirmed that determination, stating that it had "little hesitancy in upholding the Commission on the facts of this case" (Pet. App. A-12).

ARGUMENT

The opinion of the court of appeals, on which we generally rely, correctly applied the decisions of this Court. There has been little litigation concerning the interpretation of Section 3(4), and there is no conflict in decisions. Indeed, the court of appeals' decision was practically compelled by *Southern Pacific Co.* v. *United States*, 390 U.S. 744, summarily affirming 277 F. Supp. 671 (D. Neb.).

1. Petitioners argue (Pet. 21-27) that their conduct did not violate Section 3(4). But the Commission's finding that petitioners "unduly prejudiced" a connecting carrier

[6]The court of appeals concluded that BAR's recommendations to shippers were "recklessly made" and "at least misleading" even though the Commission did not find that they were fraudulent (Pet. App. A-17).

by the scheme artificially to redistribute traffic is supported by substantial evidence and is consistent with the decisions of this Court. As this Court held in *Western Pacific Railroad Co.* v. *United States*, 382 U.S. 237, 244, the purpose of Section 3(4) is "to deprive railroads of discretion to apportion economic advantage among competitors at a common interchange." The Commission's construction of Section 3(4) carries out this purpose and also helps to ensure "sound economic conditions in transportation and among the several carriers" and to prevent "undue preferences or advantages, or unfair or destructive competitive practices." See the Declaration of National Transportation Policy, preceding 49 U.S.C. 1.[7]

BAR and CP arranged to reroute BAR-originated traffic over CP's lines, to the detriment of MEC and B&M. BAR implemented that plan through a concerted traffic solicitation campaign based on otherwise confidential shipper data and misleading recommendations. As a direct result of petitioners' effort, MEC and B&M suffered financial injury to the extent of the traffic so diverted. As the three-judge district court explained in *Southern Pacific Co., supra*, 277 F. Supp. at 685:[8]

> The prohibition of Section 3(4) is against discriminatory conduct of the carrier against

[7]As this Court stated in *American Trucking Associations, Inc.* v. *Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 421, the declaration of national transportation policy is " 'the yardstick by which the correctness of the Commission's actions will be measured.' "

[8]The jurisdictional statement in *Southern Pacific* presented the Section 3(4) issue for decision by this Court (Pet. App. A-9 n. 7A). This Court's summary affirmance thus was a decision on the merits. *Hicks* v. *Miranda*, 422 U.S. 332, 343-345. Petitioners argue (Pet. 24) that the Court should overrule *Southern Pacific*, because lower courts are construing it as prohibiting solicitation "pure and simple." There is no basis for that assertion. The court of appeals here carefully limited its holding to the facts of this case and specifically left open the possibility that preferential solicitation in other contexts might be justified by economic or practical factors (Pet. App. A-12 to A-13).

> connecting lines. The Act cannot be circumvented by wrongfully inducing the shipper to commit the discrimination in place of the carrier.* * *
>
> * * * * *
>
> * * * [W]e feel that preferential solicitation when done on a "preconcerted" and "systematic" discriminatory basis, as conducted by the parties herein, falls within the statutory prohibition of Section 3(4) as well. The preferential solicitation dictated by the agreement is without concern for competitive benefits of similar lines and without relationship to the best possible service to the shipper.

The Commission's application of Section 3(4) to the facts in this case was a proper exercise of its statutory authority. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87-88; *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 748-749.

2. a. Petitioners argue (Pet. 15-21) that any attempt to penalize commercial solicitation of businesses violates the First Amendment. It seems clear, however, that commercial solicitations may be regulated in order to implement substantive legal rules. *Ohralik* v. *Ohio State Bar Association*, No. 76-1650, decided May 30, 1978. Many offenses have speech as a central element—conspiracy crimes and antitrust violations are common examples. Improper solicitation of business, here as in *Ohralik*, is another. The concerted scheme to redistribute traffic to the detriment of competitors in violation of Section 3(4) was no more "protected speech" than a conspiracy to violate the antitrust laws or a deceptive securities offering. See *National Society of Professional Engineers* v. *United States*, No. 76-1767, decided April 25, 1978, slip op. 17: "The First Amendment does not 'make it * * * impossible ever to enforce laws against agreements in restraint of trade.'" See also *Ohralik, supra*, slip op. 12, 14, 15 n. 20. As the Court observed there, the

government "does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Id.* at 9. See also *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 771-772 n. 24.

b. Petitioners further contend (Pet. 15-21) that the court of appeals' decision leaves unresolved the scope of permissible solicitation under Section 3(4), and that general guidance from the Court is required by the First Amendment. But the court of appeals remanded the case to the Commission to determine which future solicitations should be permitted under the cease and desist order (Pet. App. A-34 to A-37).[9] The Commission has reopened proceedings in compliance with the court's mandate (*id.* at A-48 to A-49), and petitioners may present to the Commission their contentions regarding the appropriate scope of its prohibition. The question that petitioners present to this Court has not been decided and is not ripe for review. *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 328.

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[9]Petitioners erroneously assert (Pet. 15) that the court of appeals banned all solicitation efforts favoring one connecting carrier. The court specifically stated: "We leave open the possibility that solicitation by an originating carrier could in some circumstances find a legal justification in factors other than service differential" (Pet. App. A-13 n. 10). The court also emphasized that its construction of Section 3(4) "does not dictate silence on the part of carriers" (Pet. App. A-17). The court's holding applies to solicitations carried out as part of a scheme to discriminate in violation of Section 3(4), where reckless and misleading recommendations are part of the scheme, and where no legitimate basis for the discrimination has been established.

c. The fact that the Commission awarded damages does not affect the First Amendment principles involved.[10] To calculate the extent of the damages to MEC and B&M resulting from the action of BAR and CP, the Commission made the "before and after" comparison approved by this Court in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, and *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555. It projected the expected market shares of the two carriers in diverted traffic on the basis of pre-violation market figures, and it compared those shares with the actual market shares enjoyed by MEC and B&M over the four-year period when the unlawful activity was in progress (Pet. App. A-18). The Commission then computed the number of carloads lost and the resulting loss of revenues. To each carload the Commission allocated a portion of the carrier's operating expenses, based on the operating ratios of the carrier. The Commission employed the resulting net revenue loss figure as the basis for its damage award (Pet. App. A-18 to A-32).[11]

Petitioners maintain (Pet. 28-30) that the damage award is too large because it includes compensation for some traffic diverted on the basis of solicitations containing accurate information. All of the solicitations, however, were part of a single illegal plan, and it was that

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[10]The damage award was authorized by 49 U.S.C. 8 and 16(1). The Commission reduced its damage award to eliminate all speculative and unsupported elements. Its conservatism is shown by repeated reductions of the proposed damage award of the administrative law judge (Pet. App. A-93 to A-106).

[11]The court of appeals noted that the Commission's difficulty in computing damages was increased by BAR's destruction of financial records, and it properly concluded that the wrongdoer should not escape liability because of uncertainty caused by its own conduct (Pet. App. A-20).

plan to divert traffic that "unduly prejudiced" MEC and B&M. The Commission applied well-settled damage law principles, and its factual determination does not require further review in this Court. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636; *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749.

3. Petitioners' contention that the statute of limitations bars part of the recovery (Pet. 31-35) is unavailing. Fraudulent concealment justifies equitable tolling of limitations periods. *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, No. 77-598, decided June 19, 1978 (Burger, C.J., concurring). Tolling was proper here under the standards of *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397. Under the rule in *Holmberg*, the statute of limitations does not begin to run until the violation has been discovered or should, through due diligence, have been discovered. The court of appeals fully explained the reasons—including efforts made by petitioners to conceal their misconduct and to evade inquiry (Pet. App. A-32 to A-34, A-40 to A-46)—why the statute of limitations did not begin to run until 1972. Further review of the concurrent factual determinations of the court of appeals and the Commission is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1847

BANGOR AND AROOSTOOK RAILROAD COMPANY, et al.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, et al.,
Respondents.

BRIEF IN OPPOSITION FOR RESPONDENTS MAINE CENTRAL RAILROAD COMPANY AND THE TRUSTEES OF THE BOSTON & MAINE CORPORATION, DEBTOR

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
QUESTIONS PRESENTED	2
STATEMENT	
A. Factual Background	3
B. Proceedings Before the Interstate Commerce Commission	6
C. Proceedings Before the Court of Appeals	7
REASONS FOR DENYING THE WRIT	9
The First Amendment Issues	9
The Construction of Section 3(4)	13
The Damages and Statute of Limitations Issues	15
CONCLUSION	19

TABLE OF CASES

CITATIONS:

American Column & Lumber Co. v. *United States*, 257 U.S. 377 (1921)	11
American Pipe and Construction Co. v. *Utah*, 414 U.S. 538 (1974)	17
Bailey v. *Glover*, 88 U.S. (21 Wall.) 342 (1875)	17
Bates v. *State Bar*, 433 U.S. 350 (1977)	13
Bigelow v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946)	16
Bigelow v. *Virginia*, 421 U.S. 809 (1975)	13
Consolo v. *FMC*, 383 U.S. 607 (1966)	18
Cook v. *Avien, Inc.*, Civil No. 77-1106 (1st Cir., filed March 28, 1978)	18
FPC v. *Colorado Interstate Gas Co.*, 348 U.S. 492 (1955)	10
Giboney v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949)	11

Page

Holmberg v. *Armbrecht*, 327 U.S. 392 (1946) 17
Hormel v. *Helvering*, 312 U.S. 552 (1941) 10
In Re Primus, —— U.S. —— (No. 77-56, decided May 30, 1978) 11
Japanese War Notes Claimants Ass'n of the Philippines, Inc. v. *United States*, 373 F.2d 356 (Ct. Cl.), *cert. denied*, 389 U.S. 971 (1967) 18
Klein v. *Bower*, 421 F.2d 338 (2d Cir. 1970) 18
Linmark Associates v. *Township of Willingboro*, 431 U.S. 85 (1977) 13
Mills v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) .. 11
Moviecolor Ltd. v. *Eastman Kodak Co.*, 288 F.2d 80 (2d Cir. 1961) 18
NLRB v. *Gissel Packing Co.*, 395 U.S. 575 (1969) .. 11, 13
Ohralik v. *Ohio State Bar Assn.*, —— U.S. —— (No. 76-1650, decided May 30, 1978) 9, 11
Paris Adult Theatre I v. *Slaton*, 413 U.S. 49 (1973) ... 11
Prather v. *Neva Paperbacks, Inc.*, 446 F.2d 338 (5th Cir. 1971) 18
SEC v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied sub nom., Coates* v. *SEC*, 394 U.S. 976 (1969) 11
Southern Pacific Co. v. *United States*, 277 F. Supp. 671 (D. Neb. 1967) (three-judge court), *aff'd per curiam*, 390 U.S. 744 (1968) 9, 14, 15
Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) 16
United States v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952) 10
Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) 13
Western Pacific Railroad v. *United States*, 382 U.S. 237 (1965) 14

CONSTITUTIONAL PROVISIONS:

United States Constitution, First Amendment .... *passim*

STATUTES:

49 U.S.C. § 3(4) ..... *passim*
§ 15(10) 15
§ 16(3)(b) 7, 17

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INTERSTATE COMMERCE COMMISSION, et al.,
Respondents.

BRIEF IN OPPOSITION FOR RESPONDENTS MAINE CENTRAL RAILROAD COMPANY AND THE TRUSTEES OF THE BOSTON & MAINE CORPORATION, DEBTOR

Respondents Maine Central Railroad Company ("MEC") and Robert W. Meserve and Benjamin H. Lacy, Trustees of the Property of the Boston & Maine Corporation, Debtor, ("B&M") file this brief in opposition to the petition for a writ of certiorari by which Bangor & Aroostook Railroad Company ("BAR") and Canadian Pacific Limited ("CP Rail") seek review of the judgment of the United States Court of Appeals for the First Circuit entered on March 30, 1978, which the court below reaffirmed by denial of a petition for rehearing on May 12, 1978.

OPINIONS BELOW

The opinion of the court of appeals is reported at 574 F.2d 1096. The order of the Interstate Commerce Commission is reported at 356 I.C.C. 349. The court's further opinion denying BAR's petition for rehearing has not been reported.

QUESTIONS PRESENTED

1. Whether the First Amendment forbids governmental regulation of commercial solicitation, consisting of communications to shippers that are "at least misleading" (App. A-17),[1] through which a railroad implements a policy of discriminating among its connecting lines in the distribution of freight traffic.

2. Whether the Interstate Commerce Commission may invoke 49 U.S.C. § 3(4), which provides that railroads must not "unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper," to forbid misleading commercial solicitation through which a railroad implements a policy of discriminating among its connecting lines in the distribution of freight traffic.

3. Whether there is substantial evidence to support the Interstate Commerce Commission's findings (a) concerning the amount of damages suffered by MEC and B&M and (b) that petitioners' fraudulent concealment of pertinent facts tolled the applicable statute of limitations.

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[1] Citations to "(App. A-__)" are to the appendix accompanying the petition. Citations to "(R.__)" are to the record lodged with the court below.

STATEMENT

A. Factual Background.

This case arises from petitioners' attempt, in the words of the Interstate Commerce Commission, "to carve up the transportation market between themselves without regard to the service characteristics . . . of another similarly situated connecting line" (App. A-76) by means of "a reciprocal sponsorship of each other's routes in a team sales effort to induce shippers to use their combined routes to the exclusion of other carriers." (App. A-78.)

BAR is a rail carrier whose principal lines run on an axis from Bangor, Maine, in the south to Madawaska at the far northern tip of the State. BAR interchanges traffic with two carriers whose roads, running east to west, cross its lines. At Northern Maine Junction, just west of Bangor, BAR connects with MEC; about 45 miles to the north, at Brownville Junction, Maine, BAR connects with CP Rail. Traffic originating or terminating on BAR may thus be routed via CP Rail and its connections or MEC and its connections, which include B&M. MEC and CP Rail routes were substantially equal in their service characteristics during the period relevant to this case. (App. A-20; *see also,* App. A-11-12, 57, 77.)

In late 1969 BAR proposed to CP Rail that the two carriers enter into an agreement calling for BAR to route 24,000 additional carloads of freight traffic annually via CP Rail—the total number of carloads of traffic originating and terminating on BAR that BAR believed could be diverted away from MEC

routes and to CP Rail routes.[2] After extended negotiations, BAR and CP Rail entered into a "private" written agreement, calling upon BAR to "interline" the full 24,000 additional carloads of traffic with CP Rail each year for 15 years. (The full text of the agreement appears at App. A-112-115.) In signing the agreement, the parties understood that they were committing themselves "vigorously to solicit traffic on behalf of CP." (App. A-7.) Internal BAR studies forecast that such a solicitation campaign would reduce the annual revenues of MEC and B&M by $2.8 million each. (App. A-5.)

Upon reaching agreement on the terms of "car allowances" that CP Rail would pay BAR for "additional" paper and potato traffic, BAR and CP Rail embarked on an extensive and vigorous campaign to "divert 'as much traffic as possible' from MEC and B&M onto . . . CP." (App. A-4; *see also* App. A-78.) Solicitation of shippers was the heart of the campaign; BAR and CP Rail traffic solicitors, often working together, visited shippers and urged them to route their traffic via CP Rail.[3] Though they frequently touted service considerations as reasons for favoring CP Rail routes, the solicitors had no factual basis to support their recommendations. (App. A-7, 11.) BAR has failed throughout these proceedings

[2] Before 1970, approximately 80 percent of all freight traffic originating or terminating on BAR traveled via MEC routes. In those years, BAR did not preferentially solicit shippers for any particular route; BAR's president testified that the solicitation condemned by the Commission "was something entirely new . . . we had never done any soliciting." (R. 1810.)

[3] The Commission found that some shippers were unaware that they could route their traffic by alternative routes. (App. A-78.)

to demonstrate a single instance in which its "recommendations to shippers were individually tailored according to service considerations." (App. A-12.)[4]

An exchange of correspondence between the chief traffic solicitors of BAR and CP Rail, which is quoted at some length in the Commission's order, confirms the policy that underlay petitioners' efforts to divert traffic. In response to complaints by BAR's solicitor that CP Rail service was deteriorating, CP Rail's solicitor acknowledged that carrier's "well known service deficiencies" but added:

> "[M]y job, and the jobs of those under my jurisdiction, consists of getting all possible traffic to move via Brownville Junction and the BAR. Service, equipment, politics, and any other considerations notwithstanding, the intention of Senior Officials of CP Rail is that we bend every effort in this direction. I have also been told by my superiors that similar instructions have been given to BAR personnel, by Senior Officers of that Company." (App. A-66.)

[4] The Commission described instances in which petitioners intentionally misrepresented the relevant service facts in order to secure CP Rail routings. (App. A-65.) Moreover, the campaign to divert traffic was not limited to face-to-face solicitation. BAR distributed "routing guides" to shippers on its lines that identified CP Rail routes to hundreds of destinations, but not the competing MEC-B&M routes to those same destinations. (App. A-7, 77.) BAR provided CP Rail with a detailed, computerized list of shippers and receivers of freight originated and terminated on BAR lines to assist CP Rail's solicitation efforts (App. A-77); BAR has never provided such information to any other carrier and the information was essential to CP Rail's solicitation efforts. (App. A-59, 77.) BAR was also able to induce shippers on its lines to route via CP Rail instead of MEC-B&M routes by manipulating the supply of boxcars provided to the shippers. (App. A-64.)

BAR's chief solicitor replied that BAR's "intentions were to route every possible BAR origination and termination via Brownville Junction, and that it and CP were working for the same goal . . ." (*Id.*)

Coinciding with the start of the diversion campaign in mid-1970 was a sharp drop in the traffic interchanged between MEC and BAR. In consequence, B&M and MEC interchanged less traffic originated and terminated on BAR. B&M and MEC attempted to ascertain the reasons for the decline in their handling of traffic originated on or destined for BAR, but BAR and CP Rail concealed and misrepresented the terms of their agreement, failed to file a copy with the Interstate Commerce Commission as they were required to do, assured MEC that BAR's policy against preferential solicitation would remain unchanged, and disguised the payment of "car allowances" on "additional" traffic as freight damage claim payments. In December 1973, the Commission initiated an investigation into BAR's interchange practices with CP Rail; shortly thereafter, MEC and B&M filed their complaints with the Commission alleging BAR's violations of Section 3(4) of the Interstate Commerce Act (the "Act"), 49 U.S.C. § 3(4), seeking damages sustained in consequence of the violation.

B. Proceedings Before the Interstate Commerce Commission.

After hearings, an ICC administrative law judge entered an initial decision in July 1976 holding that BAR, aided and abetted by CP Rail, had violated Section 3(4) of the Act. Finding that MEC and B&M, connecting carriers of BAR, had been "unduly prejudiced in the distribution of traffic not specifically routed by the shipper" during the period 1970-74,

the law judge awarded compensatory damages of approximately $1.6 million to MEC and $690,000 to B&M.

BAR and CP Rail filed exceptions with the Commission. In February 1977 the full Commission unanimously reaffirmed the administrative law judge's conclusion of law, and supporting findings of fact, that BAR had unduly prejudiced MEC and B&M in violation of Section 3(4), with the assistance of CP Rail. The Commission concluded that the statute of limitations had been tolled by petitioners' fraudulent concealment of pertinent facts. The Commission also entered an order directing BAR and CP Rail to cease and desist from conduct violating Section 3(4).[5]

C. Proceedings Before the Court of Appeals.

BAR filed a petition for review of the Commission's order with the court below, challenging the Commission's findings and conclusions both as to BAR's violation of Section 3(4) and the damages the Commission awarded. Although no party had raised any First Amendment issue in the proceedings before the Commission, BAR's principal argument in the court of appeals assailed the Commission's order as an infringement of BAR's freedom of commercial speech.[6]

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[5] The Commission reduced the amount of damages awarded to MEC and B&M to $176,323 and $86,917, respectively.

[6] MEC, B&M and CP Rail intervened in the proceedings. In addition, MEC and B&M filed petitions for review in the court below challenging the adequacy of the Commission's award of damages; BAR intervened in each case. The court of appeals consolidated the cases for oral argument and decision.

Save for the portion directing BAR and CP Rail to refrain from future violations of Section 3(4), the court below affirmed the Commission's order in all respects. With "little hesitancy in upholding the Commission on the facts of this case" (App. A-12), which disclosed "'hard core' conduct" (App. A-13 n.10, 35) in violation of the Act, the court found that substantial evidence supported the Commission's findings that petitioners' concerted solicitation campaign consisted of communications that "were at least misleading" (App. A-17), and that BAR "exerts substantial influence over shippers' choice of routes, regardless of a shipper's experience or sophistication." (App. A-16.) The court of appeals concluded that the facts fully supported the Commission's conclusion of law that BAR's conduct amounted to discrimination in the distribution of traffic among similarly situated connecting lines, in violation of Section 3(4). (*Id.*)

Rejecting BAR's newly-discovered First Amendment arguments, the court noted that "[*p*]*ost hoc* characterization of these activities as salutary promotion of competition through fair-minded recommendations to strong and sophisticated shippers is implausible." (App. A-12.)

The court of appeals vacated the Commission's cease and desist order, however, and remanded the case to the Commission for further proceedings. While the "hard-core" conduct disclosed by the record was, in the court's view, undoubtedly a past violation of Section 3(4) (App. A-35), the court held that an order governing future conduct of the petitioners should admit of no uncertainty. (*Id.*) On

May 12, 1978, the court below denied BAR's petition for rehearing concerning the application of the statute of limitations.

REASONS FOR DENYING THE WRIT

The petition raises no issues warranting this Court's review of the judgment below. The court of appeals rejected petitioners' First Amendment arguments with an analysis that is consistent in all respects with the line of "commercial speech" cases, culminating in the opinion in *Ohralik* v. *Ohio State Bar Ass'n*, ___ U.S. ___ (No. 76-1650, decided May 30, 1978), recently decided by this Court. The interpretation of Section 3(4) embraced by the Commission and affirmed by the court of appeals conflicts with no other decision, finds strong support in the facts of record and follows precisely in the footsteps of a strikingly similar case interpreting Section 3(4), which this Court summarily affirmed.[7] Finally, petitioners' challenges to the Commission's award of damages and findings as to tolling of the statute of limitations by fraudulent concealment are in substance little more than disagreement with the court of appeals' findings that the Commission's determinations were supported by substantial evidence in the record.

The First Amendment Issues.

If petitioners' First Amendment arguments are not barred at the threshold for failure to raise them be-

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[7] Southern Pacific Co. v. United States, 277 F. Supp. 671 (D. Neb. 1967) (three-judge court), *aff'd per curiam*, 390 U.S. 744 (1968).

fore the Commission,[8] they are plainly foreclosed by this Court's recent "commercial speech" decisions, which confirm the correctness of the opinion below.

1. The court of appeals based its rejection of petitioners' First Amendment contentions on two independent grounds. *First,* it held that freedom of speech does not enjoy the same protection in commercial contexts as it does in other contexts; the court pointed out that "exchange of information can be a vital element in an illegal scheme" in a number of areas of "extensive economic supervision, such as the securities, antitrust and transportation fields . . ." (App. A-17.) It found petitioners' campaign to divert traffic to be such an "illegal scheme." In these observations, the opinion of the court below was squarely in accord with the decisions of this Court. Several weeks after the court below denied BAR's petition for rehearing, this Court stated the same principles in strikingly similar terms:

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[8] As petitioners recognize (Pet. 16 n.7), failure to raise issues during Interstate Commerce Commission proceedings ordinarily precludes a party from raising such issues on judicial review. United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952); *see also* FPC v. Colorado Interstate Gas Co., 348 U.S. 492 (1955). Petitioners do not advance exceptional circumstances justifying waiver of the rule, Hormel v. Helvering, 312 U.S. 552 (1941), and the explanation of their failure to raise such issues acknowledges that they could "theoretically" have raised such issues before the Commission in their exceptions to the administrative law judge's initial decision. (Pet. 16-17 n.7.) (Petitioners do not explain why they did not petition the Commission for rehearing or reopening.)

Finally, petitioners' assertion that "no prejudice" could result by belated consideration of such issues (*id.*) ignores that the Commision, MEC and B&M have already spent nearly five years litigating this case.

> " '[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.' *Giboney* v. *Empire Storage & Ice Co.,* 336 U.S. 490, 502 (1949). Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC* v. *Texas Gulf Sulphur Co.,* 401 F.2d 833 (CA2, 1968). *cert. denied,* 394 U.S. 976 (1969), corporate proxy statements, *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970), the exchange of price and production information among competitors, *American Column & Lumber Co.* v. *United States,* 257 U.S. 377 (1921), and employers' threats of retaliation for the labor activities of employees, *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 618 (1969). *See Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 61-62 (1973). Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik* v. *Ohio State Bar Ass'n, supra,* slip op. at 8-9.

BAR's desire to distribute traffic among its connecting lines on a preferential basis, like a lawyer's interest in employment, "is a subject only marginally affected with First Amendment concerns" and "falls within the State's proper sphere of economic . . . regulation." *Id.,* at 12; *cf. In Re Primus,* ___ U.S. ___ (No. 77-56, decided May 30, 1978).

2. The *second* ground on which the court below rejected petitioners' First Amendment arguments was that petitioners did not limit their communications with shippers to truthful, carefully ascertained infor-

mation concerning available routes, but engaged in active advocacy of the benefits of CP Rail routes when all available evidence indicated that CP Rail routes were not superior to MEC-B&M routes. In that sense, the solicitation was "at least misleading" (App. A-17); its impact on MEC and B&M was pernicious because it was conducted by "an originating carrier such as BAR" that "exerts substantial influence over shippers' choice of routes . . ." (App. A-16.)*

On this ground, too, the opinion of the court below accords with the decisions of this Court. Just as a lawyer's "in-person solicitation . . . does not stand on a par with truthful advertising" because of the significant risk that laymen would be misled or unduly influenced, *Ohralik, supra,* slip op. at 7, 9-10, solicitation undertaken by an originating carrier for the purpose of discriminating among connecting lines in the distribution of traffic does not receive the same constitutional protection as truthful advertising of objectively determined facts.

The court below was careful to emphasize that neither its nor the Commission's interpretation of Section 3(4) forbids "an originating carrier from providing information of any and all sorts to shippers on an even-handed basis" so long as the information is accurate and in a factual form not apt to exert pressure on shippers. (App. A-17.) Petitioners were not denied any right to provide shippers with accurate and balanced factual information, which is the right that the "commercial free speech" cases have protected, subject to the limitation that "the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena." *Bates* v. *State Bar,* 433 U.S. 350, 383 (1977); *see also Linmark Associates* v. *Township of Willingboro,* 431 U.S. 85, 98 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U.S. 748, 770 (1975); *Bigelow* v *Virginia,* 421 U.S. 809, 826 (1976); *NLRB* v. *Gissel Packing Co., supra,* 395 U.S. at 618.

* It borders on the frivolous for petitioners to contend that the record does not support the findings concerning BAR's influence over shippers on its lines. Quite apart from the examples cited by the court of appeals, the Commission described the influence exerted by virtue of BAR's power over shippers' car supplies (App. A-56, 64-65, 77), quoted many statements by BAR representatives concerning BAR's control of shippers' routings (App. A-58, 60-61), and noted the ignorance of shippers concerning availability of alternate routings. (App. A-78.) BAR's vice president testified that shippers rely on the originating carrier to provide routing advice. (R. 1899, 2567-68.)

The Construction of Section 3(4).

3. Petitioners also fail to tender an issue worthy of this Court's review with their contention that Section 3(4) cannot be violated so long as the shipper fills in the routing blank on the waybill and carriers honor that routing. (Pet. 21-27.) Under petitioners' formalistic interpretation of Section 3(4), a carrier may do all within its power to induce shippers to route their traffic in a manner that discriminates among the carrier's connecting lines. It may engage in misleading solicitation, manipulate boxcar supply and provide selective routing information—yet escape the strictures of Section 3(4) because, according to petitioners, the provision literally extends only to "the distribution of traffic that is not specifically routed by the shipper."

The Commission refused to accept an interpretation of Section 3(4) that would so plainly subvert its "procompetitive" policy (App. A-75) by permitting "an originating carrier and one of its connecting lines [to] sit down privately and negotiate agreements to carve up the transportation market between themselves without regard to the service characteristics . . . of another similarly situated connecting line." (App. A-76.) In reaching the conclusion that Section 3(4) bans any conduct by which a carrier seeks "to apportion economic advantage among competitors at a common interchange," *Western Pacific Railroad* v. *United States,* 382 U.S. 237, 244 (1965), the Commission independently appraised the analysis of Section 3(4) undertaken in *Southern Pacific Co.* v. *United States,* 277 F. Supp. 671 (D. Neb. 1967) (three-judge court), *aff'd per curiam,* 390 U.S. 744 (1968), and blessed that analysis as sound transportation policy. (App. A-68-77.)

Petitioners' efforts to distinguish *Southern Pacific* are unavailing. The *Southern Pacific* court held squarely that preferential solicitation that is part of a campaign by which a carrier systematically discriminates among similarly situated connecting lines in the distribution of traffic violates Section 3(4):

> "The Act cannot be circumvented by wrongfully inducing the shipper to commit the discrimination in place of the carrier . . . . [P]referential solicitation when done on a 'preconcerted' and 'systematic' discriminatory basis . . . falls within the statutory prohibition of Section 3(4), as well. The preferential solicitation dictated by the agreement is without concern for competitive benefits of similar lines and without relationship to the best possible service to the shipper. It is as much an apportionment of 'economic advantage' as direct routing itself." 277 F. Supp. at 685.

This Court summarily affirmed *Southern Pacific* on a jurisdictional statement that tendered the same issue of Section 3(4)'s construction. Each tribunal that has considered the question has reached the identical conclusion that Section 3(4), whose purpose is to protect connecting lines from discrimination at the hands of a carrier with power to influence traffic flows, reaches systematic and preconcerted discriminatory solicitation calculated to influence shippers' routing selection and thus "distribute" traffic. (App. A-14-16.) That interpretation does not infringe the right of shippers under 49 U.S.C. § 15(10) to select their own routings (Pet. 23), but ensures that the right will not be diluted by undue carrier influence.

The Damages and Statute of Limitations Issues.

4. Petitioners' murky discussion of the damages awards (Pet. 27-31) poses a false issue in its attempt to characterize the awards as "windfalls." The Commission and the court below applied standard principles in assessing the compensatory damages to be awarded. *First,* the Commission found—in part from the admissions of petitioners' own officers—that MEC and B&M suffered injury in the form of actual diversion of traffic. (App. A-77-78, 20-21.) *Second,* it was determined that the *only* factor that could explain the sharp decline in MEC's and B&M's market share of traffic originated and terminated on BAR

was the illegal diversion. (App. A-20-21.)[10] *Third,* the Commission computed the revenues MEC and B&M would have received had their market share of certain commodities remained unchanged, subtracted the costs that would have been incurred in handling the additional traffic, and thus arrived at damages. (App. A-19.)

While BAR urged below that damages should be calculated by tracing each of the thousands of carloads of traffic alleged to have been diverted during 1970-74, both the Commission and the court of appeals rejected the argument because of the virtual impossibility of the task and because BAR and CP Rail had deliberately destroyed important origin and destination data. (App. A-20.) Because MEC and B&M had demonstrated the fact of injury and shown that only the illegal diversion could account for the decline in their market share, use of the "before-and-after" test was appropriate under traditional principles governing the computation of compensatory damages. (App. A-19-20, *citing Bigelow* v. *RKO Radio Pictures, Inc.,* 327 U.S. 251 (1946); *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U.S. 555 (1931).) Petitioners' contentions with respect to the computation of damages amount to no more than a challenge to the evidence.

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[10] Petitioners describe the methodology incorrectly when they say that it "included assessments for all additional traffic which shippers routed via CP." (Pet. 27.) In fact, the assessment was computed by analyzing the increase of CP Rail's percentage market share of traffic originated or terminated on BAR that could have been routed either by MEC routes or CP Rail routes. (App. A-18-19.)

5. Similarly, petitioners attempt to phrase as a question of law another issue that depends critically upon the findings of fact made by the Commission and endorsed by the court below: whether MEC and B&M exercised due diligence in their efforts to ascertain whether they had a cause of action against BAR, but were misled by petitioners' evasions and fraudulent concealment of pertinent facts, so that the statute of limitations of 49 U.S.C. § 16(3)(b) was tolled.[11]

Petitioners emphasize that MEC and B&M came to suspect that BAR and CP Rail had undertaken some new policy that involved solicitation and an increase in CP Rail's market share of BAR traffic. But they wholly omit to mention that, in response to numerous requests for information, BAR and CP Rail concealed facts and affirmatively misled MEC and B&M: (1) BAR assured MEC that it had not and would not engage in preferential solicitation (App. A-43); (2) CP Rail advised MEC that it had embarked on a unilateral "sales blitz" involving, at most, a "per diem agreement" (*id.*); (3) BAR and CP Rail officials refused to produce copies of the agreement (App. A-33 n.17) while they orally misrepresented its nature and terms (App. A-42-43); (4) "car allowances" were disguised as freight damage claim payments (App. A-12); and (5) neither BAR nor CP Rail complied with ICC regulations requiring the filing of traffic agreements with the Commission. (App. A-44 n.2.) Under all these circumstances, the

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[11] Petitioners do not contest that a federal statute of limitations may be tolled by fraudulent concealment. Holmberg v. Armbrecht, 327 U.S. 392 (1946); *see also* American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974); Bailey v. Glover, 88 U.S. (21 Wall.) 342 (1875).

court below found substantial evidence to support the Commission's conclusion that, despite diligent efforts by MEC and B&M to ascertain the nature of the conduct undertaken by BAR and CP Rail, evasions and misrepresentations lulled and misled them. (App. A-44.)

Far from announcing any new or different legal standards, the court below held that, under all the facts and circumstances of record, there was substantial evidence to support the Commission's conclusions that MEC and B&M had exercised due diligence in the assertion of their rights—sufficient evidence " 'to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' " *Consolo* v. *FMC*, 383 U.S. 607, 620 (1966). Indeed, the cases which petitioners cite [12] turn not on any different legal standard governing the tolling of statutes of limitations, but upon differing assessments of differing factual situations.

[12] Cook v. Avien, Inc., Civil No. 77-1106 (1st Cir., filed March 28, 1978); Prather v. Neva Paperbacks, Inc., 446 F.2d 338 (5th Cir. 1971); Klein v. Bower, 421 F.2d 338 (2d Cir. 1970); Japanese War Notes Claimants Ass'n of the Philippines, Inc. v. United States, 373 F.2d 356 (Ct. Cl.), *cert. denied*, 389 U.S. 971 (1967); Moviecolor Limited v. Eastman Kodak Co., 288 F.2d 80 (2d Cir.), *cert. denied*, 368 U.S. 821 (1961).

CONCLUSION

The writ should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1977

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BANGOR AND AROOSTOOK RAILROAD CO.
and CANADIAN PACIFIC LIMITED,
PETITIONERS,

v.

INTERSTATE COMMERCE COMMISSION, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONERS

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Reply may be necessary in order to put the Petition in proper focus with respect to the underlying conduct which is its subject.

With a few isolated exceptions, the speech in question is essentially harmless solicitation of routes via Canadian

Pacific. No amount of characterization of it can change that. Except in these instances, the Commission did not find it to be false or fraudulent or coercive or misleading or reckless. Nor except in these instances are there findings that a single shipper was misled by it or that it was calculated to mislead. Indeed, the content of the speech was not the basis of the Commission's decision.

Since the briefs in opposition endeavor to portray the solicitation as pervasively misleading and reckless, petitioners respectfully refer the Court for its convenience to the only two pages of the Commission's decision that make such findings (Petition, Appendix A-65, 66).

The briefs in opposition substantially are addressed to the merits, and ask this Court to characterize the solicitation as the Commission did not.

They do not belie the importance or worthiness of consideration by this Court of two principal questions presented—

> whether the solicitation is within the reach of Section 3(4),

and

> if so, whether Section 3(4) so interpreted infringes rights protected by the First Amendment.

Whether these and related questions are important and worthy of this Court's consideration with reference to essentially bland preferential solicitation by an originating carrier is what is before the Court at this time.

Conclusion

For the reasons set forth herein and in the Petition, a writ of certiorari to review the decision of the Court of Appeals for the First Circuit should issue.

August 24, 1978

Respectfully submitted,

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